Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

HARRY E. FIGGIE III, M.D.,

Petitioner,

v.

AARON MOSKOVITZ,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), the Court affirmed punitive damage awards primarily because those awards were imposed in accordance with time-honored common-law methods. This case presents two questions concerning the constitutional validity of punitive damage awards under an Ohio rule that departs markedly and gravely from the common law:

1. Does the Due Process Clause of the Fourteenth Amendment require a State to adhere to the settled and uniform common-law rule that punitive damages can be awarded in a tort action based only on the tortfeasor's conduct that gave rise to the tort action?

2. Does the Due Process Clause of the Fourteenth Amendment prohibit the imposition of punishment on a person for acts the person has not been found to have committed?

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PETITION FOR WRIT OF CERTIORARI

Harry E. Figgie, III, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 69 Ohio St. 3d 638, 635 N.E.2d 331 (1994). It is reprinted in the Appendix at App. 2. The majority opinion, reflecting the views of four Justices, appears at App. 20; the dissent, reflecting the views of three Justices, appears at App. 53.

The opinion of the Court of Appeals for Cuyahoga County, Ohio, entered on January 7, 1993, is unpublished. It appears at App. 62. The two-person majority opinion appears at App. 64. The opinion of the dissenting judge appears at App. 102.

The opinion of the Court of Appeals, correcting, *nunc pro tunc*, certain sentences in the dissenting opinion, is unpublished. It appears at App. 134.

The Judgment Entry of the Court of Common Pleas of Cuyahoga County, Ohio, recording the jury verdict, entered on December 28, 1989, appears at App. 139. The Judgment Entry of the Court of Common Pleas of Cuyahoga County, Ohio, denying defendants' motion for judgment notwithstanding the verdict, or in the alternative for new trial, on punitive damages, entered August 21, 1990, appears at App. 141.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 27, 1994. (App. 1.) This Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . . "

STATEMENT OF THE CASE

1. Factual and Procedural Background

A. Parties

Petitioner, Harry E. Figgie, III, M.D., ("Figgie") is a board-certified orthopedic surgeon. Respondent Aaron Moskovitz ("Moskovitz") is the widowed husband of Margaret Moskovitz ("Mrs. Moskovitz") and the legal representative of her estate.

B. Figgie's treatment of Mrs. Moskovitz

In October 1986, Mrs. Moskovitz sought treatment from Figgie for a lump on the back of her left ankle. (R. 923.) Figgie concluded that the lump did not require attention because it was a problem related to her tendons. In the next ten months, Figgie continued to observe the lump on Mrs. Moskovitz's achilles tendon, but, believing it to be noncancerous, he did not conduct a biopsy of it. (R. 192, 195-97; 925.) In August 1987, Figgie noted that the swelling on the back of Mrs. Moskovitz's left ankle had increased in size, and recommended an x-ray and accompanying investigation. The x-ray was taken of her left ankle on September 21, 1987.

Six days later, Figgie recommended to Mrs. Moskovitz that she have a biopsy of the ankle mass. (R. 233; 926.) On October 6, 1987, she agreed to the biopsy, and asked that it be deferred until after the upcoming Jewish holidays.

Figgie surgically excised the mass on November 10, 1987. (R. 235; 244-45.) The mass was examined and found to be a rare malignant soft tissue cancer. (R. 279; 281-82.)

C. The handling of Mrs. Moskovitz's medical records.

Moskovitz's cause of action was for medical negligence. The handling of Mrs. Moskovitz's medical records during a period entirely *after* the claimed negligence was the sole basis for the award of punitive damages in this case. (App. 20.)

In essence, Moskovitz claimed that after Figgie learned Mrs. Moskovitz had been diagnosed with epithelioid sarcoma in November 1987 he changed his office notes relating to Mrs. Moskovitz's office visit on September 23, 1987. Specifically, Moskovitz contended that Figgie altered the medical records to reflect that the delay in diagnosing cancer was attributable to Mrs. Moskovitz's conscious choices rather than his neglect. Although, in the words of the dissenting justices of the Ohio Supreme Court, "the question whether Figgie 'altered certain records to conceal the fact that malpractice occurred' was a hotly disputed issue at trial, an issue vigorously rebutted with lengthy testimony by Figgie and his nurse", (App. 54), Petitioner accepts for purpose of this Petition that the alteration of medical records occurred at the time and in the manner described in the opinion of the Supreme Court of Ohio – that is, wholly after Figgie's acts of medical negligence. (App. 4-10.) In short, Petitioner accepts as binding in this Court the conclusion of the Supreme Court of Ohio that respondent introduced evidence at trial that Petitioner altered Mrs. Moskovitz's medical records after he learned of his neglect, and after it had injured Mrs. Moskovitz.

2. The Judgment in the Trial Court

On November 4, 1988, Moskovitz and Mrs. Moskovitz filed a complaint against Figgie, among others, alleging medical malpractice by Figgie in failing to timely diagnose and treat Moskovitz's cancer before it had metastasized. In April 1989, an amended complaint was filed against Figgie, among others, seeking punitive damages for the first time. Figgie opposed the filing of the amended complaint on, *inter alia*, federal constitutional grounds.

On December 20, 1989, the jury returned its verdict in favor of respondents and against Figgie. The jury awarded respondent $2,000,000 on the survival claim, $1,250,000 on the claim for wrongful death, $5,000 for funeral and burial expenses and $3,000,000 in punitive damages.

The trial court entered judgment in accordance with the jury's verdict. As to punitive damages, Figgie filed a motion for judgment notwithstanding the verdict or, alternatively, a motion for a new trial. Figgie's motion was denied. (App. 141.)

3. The Judgment in the Court of Appeals

Figgie appealed to the court of appeals, claiming, among other things, that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment. By a 2-to-1 decision, the court of appeals ruled that respondent was not entitled to punitive damages as a matter of law. The court of appeals applied the settled common-law rule that punitive damages can be awarded only for tortious conduct that causes compensable harm. It reasoned that the tortious conduct respondent complained of was Figgie's medical malpractice. The claimed alteration of records, which was the sole basis for the punitive damage award, had not been established at trial as a separate tort, causing compensable harm, and therefore did not provide a legal basis for an award of punitive damages. (App. 71-77.)

4. The Judgment of the Ohio Supreme Court

On July 27, 1994, by a 4-to-3 vote, the Supreme Court of Ohio, reversed the court of appeals and reinstated the award of punitive damages, but granted a remittitur of $2,000,000, reducing the award to $1,000,000.[1]

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[1] The opinion addressed a number of issues raised on appeal. The only issue material to this Petition involves the punitive damage award.

To support that result, the majority elaborately reconfigured the precedents of the Ohio Supreme Court. The majority acknowledged the existence of an unbroken line of precedents of that court holding that punitive damages are awardable in tort actions only to punish the tort that is proved fully at trial, including proof of compensable harm caused by the tort. (App. 21-22, citing *Shimola v. Nationwide Ins. Co.*, 25 Ohio St.3d 84, 495 N.E.2d 391 (1986), *Bishop v. Grdina*, 20 Ohio St.3d 26, 485 N.E.2d 704 (1985), *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984) and *Richard v. Hunter*, 151 Ohio St. 185, 85 N.E.2d 109 (1949).)

It acknowledged further that Ohio recognizes the separate tort of spoliation of evidence and that a plaintiff establishing that tort would be entitled to recover punitive as well as compensatory damages upon a proper showing. (App. 23.) Still, the majority concluded that Ohio law permitted recovery of punitive damages in a tort action for misconduct other than the tortious conduct that is the subject of the action.

The three dissenting justices, with Justice Wright writing, sharply disagreed with the majority's views. The dissenters did "not agree with the majority's decision to permit punitive damages in a negligence action, because the subsequent spoliation of records does not make the original act of negligence malicious." (App. 53.) The dissenters' "major problem" with the majority's opinion was with its treatment of the alleged spoliation. Justice Wright observed:

> As is true with the determination of any significant fact, it was the province of the jury to make a finding and return a verdict on the issue of the alleged spoliation of evidence. Such a determination is not our task. What the majority overlooked, presumably, is that the trial judge did not include in his charge to the jury one single word concerning this hotly disputed issue of spoliation. Indeed, the

> entire jury charge dealt strictly with medical malpractice. The plaintiff neither pleaded a cause of action for spoliation nor asked for instructions on spoliation.

(App. 54.)

The dissenters observed that the traditional common-law rule, which the majority abandoned, provided ample relief for a plaintiff victimized by spoliation of evidence.

> When a physician commits spoliation of evidence to avoid liability for his or her medical negligence, the patient is automatically entitled to at least nominal damages. In some cases, for example where the spoliation impairs the future course of treatment of the patient, more than nominal damages may also result.

(App. 55.) The dissenters observed further that where spoliation is proved, punitive damages are available if the prevailing Ohio standard for such an award is met. (*Ibid.*)

In conclusion, the three dissenting justices expressed their view that the punitive damage award in this case "violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution." (App. 56, citing *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); and *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).)

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court's recent decisions make clear that the Due Process Clause limits the power of the states to permit the imposition of punitive damages in civil actions. Despite the differences among them, and the different conclusions they reach, the several opinions in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990) and *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993) establish this proposition unmistakably.

These decisions, which focus largely on questions of excessiveness, support the conclusion that judicial review of

punitive damage awards is mandated by the Due Process Clause. *Haslip* emphasized that judicial review of the size of damages awards is an essential component of the method of imposing punitive damages. 499 U.S. at 18, 21-22, 23-24, *Id.* at 51-52 (O'Connor, J., dissenting). Likewise, in *TXO*, every Member of the Court recognized, either expressly or implicitly, that judicial review of punitive awards is constitutionally required. 113 S.Ct. at 2719-23 (plurality), *Id.* at 2724-25 (Kennedy, J., concurring in part and in judgment), *Id.* at 2727 (Scalia and Thomas, JJ., concurring in the judgment), *Id.* at 2731-42 (O'Connor, White and Souter, JJ., dissenting).

Those decisions affirm the fundamental legitimacy of punitive damages, an affirmation rooted in their common-law pedigree and their historical evolution in the jurisprudence of the States. *Haslip*, 499 U.S. at 15-18 (surveying common law). Indeed, the common-law footing of punitive damages suggests simultaneously two conclusions: first, that punitive damages are permissible within an ordered legal system for resolution of civil disputes, *Id.* at 19; and, second, that the method must comport with "the requirement of 'fundamental fairness' " expressed by the Due Process Clause of the Fourteenth Amendment. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24 (1981). And it is both settled and wise law that the concept of "fundamental fairness" be explicated with recognition of "the importance of history and widely shared practice." *Schad v. Arizona*, 501 U.S. 624, 670 (1991). *Accord Haslip*, 499 U.S. at 15-18, *Id.* at 25-40 (Scalia, J., concurring in judgment), *TXO*, 113 S.Ct. at 2721 & n. 25, *Id.* at 2726 (Scalia and Thomas, JJ., concurring in judgment).

Measured against any appropriate constitutional standard, the rule adopted by the Supreme Court of Ohio in this case, and the Ohio Court's decision affirming the punitive damage award, is wrong, and it violates fundamental requirements of fairness and due process. The rule adopted by the Ohio court markedly, and dangerously, departs from the common law, from the historical practice of Anglo-American legal systems, and from the (until now) uniform practice in American jurisdictions. The result is a rule that fails to comport with the requirements of the Due Process Clause.

Until now, it has been the invariable rule that punitive damages can be awarded in a tort action only when the defendant's tortious or actionable conduct itself meets the standard of iniquity expressed in the particular jurisdiction's law. While the governing standard has varied over time and from jurisdiction to jurisdiction, the common law has invariably required that any punitive award be imposed only for the tortious or actionable conduct itself.

First, as shown in part I, below, this required connection between the actionable conduct and the punitive award is a constitutionally essential feature of the common law of punitive damages.

The rule adopted in this case, which abandons the common-law requirement, wholly undermines the procedural and substantive requirements applicable to punitive damage awards by making judicial review of such awards impossible.[2] If the decision below is permitted to stand, it will thus threaten the very foundations on which this Court's evolving punitive damages jurisprudence has been built.

Second, as shown in part II, below, the decision below offends a basic precept of due process, quite apart from those that have been implicated in this Court's recent decisions on punitive damages: the time-honored principle that a person cannot be punished for acts that the person has not been found to have committed. That elemental rule has been repeatedly announced and applied in a variety of situations. Until now, the Court has not been called upon to make clear that it applies as well to the imposition of punitive damages in civil litigation. If that simple rule is not resoundingly affirmed, the prospect of genuinely renegade punitive damage awards wholly unconnected to any settled judicial process will infect civil litigation in pervasive and unmanageable ways.

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[2] The opinions in *Haslip* and *TXO* reflect, in varying degrees, due process concerns that are both substantive and procedural. See Note, The Supreme Court, 1992 Term, Leading Cases, "Substantive Due Process – Punitive Damages", 107 Harv. L. Rev. 185.

This, then, is a perfect opportunity for the Court to articulate a clear, cogent and functional rule that melds the procedural and substantive concerns that have made the subject of punitive damages so vexed and vexing in the past decade.

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, IN ACCORD WITH THE SETTLED AND UNIVERSAL COMMON-LAW RULE, PERMITS THE IMPOSITION OF PUNITIVE DAMAGES IN A TORT ACTION ONLY TO PUNISH THE TORTIOUS CONDUCT THAT GAVE RISE TO THE ACTION.

Punitive damages have a rich lineage in American law. They have "long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238, 255 (1984). *See generally Haslip*, 499 U.S. at 15-18, and cases cited; Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931). The firm historical foundation of punitive damages in American common law has contributed significantly to this Court's rejection of broad-gauged attacks on punitive damages as violative of the Eighth and Fourteenth Amendments. *Haslip*, 499 U.S. at 15-18, *Id.* at 25-40 (Scalia, J., concurring in judgment), *TXO*, 113 S.Ct. at 2721 & n. 25, *Id.* at 2726 (Scalia and Thomas, JJ., concurring in judgment).[3] "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to

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[3] The assaults on punitive damages have issued from a variety of places, most notably academic journals, which in the past decade or so have contained an ever-more-resounding fusillade on the constitutionality of punitive damages generally, on the procedures that govern their award, and on the imposition of such damages in particular kinds of cases. *See, e.g.*, Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983), Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment, 85 Mich. L. Rev. 1699 (1987), and Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982).

affect it." *Haslip*, 499 U.S. at 17, quoting *Sun Oil Co. v. Wortman* 486 U.S. 717, 730 (1988) and *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).[4]

The rule adopted by the Ohio Supreme Court in this case markedly departs from the standards of the common law by permitting an award of punitive damages for conduct wholly unconnected to the tortious or actionable conduct that is the subject of the lawsuit. Indeed, the Ohio rule permits a punitive award without requiring any identification, whether in the pleadings or at trial, of the conduct that is being punished. In these respects, the Ohio rule is fundamentally inconsistent with the Due Process principles established by this Court's decisions.

A. The Rule in Haslip and TXO

In *Haslip*, the Court, in conducting its Due Process inquiry, ultimately deferred to Alabama's long-standing common-law procedures regarding punitive damages, while suggesting that the Constitution imposed general substantive constraints of "reasonableness."[5]

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[4] The orthodox common-law procedures for imposing punitive damages predated the Fourteenth Amendment, *Day v. Woodworth*, 13 How. 363 (1852), and this Court has declined to find in that Amendment a charter to "displace[] the procedure of the ages." *Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934).

[5] Alabama's procedures, to which the majority yielded, included jury instructions that reflected the goals of deterrence and retribution, mandated evaluation of the "character and degree of the [defendant's] wrong," and provided for "significant" but "not unlimited" jury discretion. Alabama procedure also included "post-trial procedures for scrutinizing punitive awards." 499 U.S. at 20-22, citing *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050 (Ala. 1987), *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) and *Wilson v. Dukona Corp.*, 547 So. 2d 70 (Ala. 1989).

In *TXO*, the Court alluded to the prospect of substantive due process limits on punitive damage awards, but ultimately held that the award in that case was not "grossly excessive." 113 S.Ct. at 2720.[6]

Two core principles emerge from *Haslip* and *TXO*: *first*, to the extent a State's punitive damages regime conforms with common-law rules, that regime is entitled to broad deference when assailed under the Due Process Clause, and *second*, the Court will review punitive damage awards against a range of criteria to determine whether they violate the constitutional strictures on such awards.

The essential content of the first principle is relatively easily to define: where the state method adheres to the common-law rules regarding imposition of punitive damages, an award of such damages is entitled to great respect.[7] In *TXO*, the plurality observed that "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity." 113 S.Ct. at 2720.[8]

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[6] The plurality decision in *TXO* affirms the view that the Due Process Clause requires a substantive due process inquiry into the size of punitive-damage awards, distinct from the post-verdict reasonableness review conducted by state courts as dictated by procedural due process.

[7] *Smith v. Wade*, 461 U.S. 30 (1983) (affirming punitive damages under 42 U.S.C. § 1983); *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26, 36 (1889) ("propriety and legality [of punitive damages] have been recognized . . . by repeated judicial decisions for more than a century"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("wisdom of allowing such additional damages to be given is attested by the long continuance of the practice").

[8] The views of Justices Scalia and Thomas appear to be that this presumption should be irrebuttable. That is, a determination that the procedures conform to the common-law method ends the inquiry as to the validity of a punitive damage award. *Haslip*, 499 U.S. at 39-40 (Scalia, J., concurring) ("Since jury-assessed punitive damages are a part of our living

The contours of the second principle – the Due Process limitation on excessiveness – are less clear, as they must be derived, to the extent possible, from the various opinions in *TXO*. The plurality in that case rejected each party's suggested standards for due process review. 113 S.Ct. at 2718-20.[9] Still, the plurality "echo[ed]" Haslip and held that "[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." *Id.*, quoting *Haslip*, 499 U.S. at 18. This calculus includes a comparison of the amount of actual damages (including potential or possible harms the defendant might have caused) with punitive damages, the defendant's net worth, bad faith, and similar past misconduct. 113 S.Ct. at 2722.

Justice Kennedy wrote separately in *TXO* to declare his doubts about the plurality's "fickle" substantive due process analysis. *Id.* at 2724-25 (Kennedy, J., concurring in part and concurring in the judgment).[10] He proposed in its stead an

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tradition that dates back prior to 1868, I would end the suspense and categorically affirm their validity."); *TXO*, 113 S.Ct. at 2727 (Scalia and Thomas, JJ., concurring: "the Constitution gives federal courts no business in this area, except to assure that due process (i.e., traditional procedure) has been observed.") The *TXO* plurality found this reasoning "persuasive" but ultimately departed from it. 113 S.Ct. at 2720.

[9] Both TXO and Alliance assumed the existence of substantive limits derived from Due Process, though they proposed different standards for divining those limits. Alliance advanced the notion of traditional "rational basis" scrutiny; TXO, on the other hand, proposed "a form of heightened scrutiny", embodying " 'objective' criteria of fairness", including an evaluation of prior awards in the relevant jurisdiction, awards for similar conduct in other jurisdictions, comparable statutory penalties, and the relationship between prior compensatory and punitive awards. *Id.* at 2718-19.

[10] Justice Kennedy had also concurred in *Haslip*, treating the state common-law procedures in that case as virtually dispositive of legality. See *Haslip*, 499 U.S. at 40-42 (Kennedy, J., concurring in the judgment).

assessment of the reasons considered by the jury in awarding punitive damages.[11]

In her dissent, Justice O'Connor, joined by Justice White and, in part, by Justice Souter, observed approvingly that, despite its scattered opinions and ultimate result, a majority of the Court had ruled that the Due Process Clause mandates a substantive proportionality review. 113 S.Ct. at 2713. For her, that review entails application of objective criteria similar to those proposed by TXO. *See* n. 9, above.

B. The Decision Below is Unconstitutional Because it Wholly Undermines the Rules Announced in *Haslip and TXO.*

Whether the federal constitutional inquiry is limited, as Justices Scalia and Thomas would limit it, to an evaluation of a State's compliance with common-law methodology, or instead involves a broader "objective" substantive inquiry, the rule announced by the Supreme Court of Ohio in this case plainly offends the Due Process Clause. It departs radically and perilously from the common-law rule that requires an award of punitive damages in a tort case to be directed at the tortious conduct of the defendant rather than at some free-floating claim that the defendant is a bad actor; and, because of that departure, it utterly confounds any inquiry into excessiveness.

This is so because the punitive damage award in this case, and any award under the novel Ohio rule, is entirely unconnected to any adjudicated wrong, and it is therefore in no way susceptible to comparative assessment.

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[11] While Justice Kennedy was not sanguine about the jury's apparent mingling of motivations in *TXO*, he nonetheless concluded that, on balance, sound reasons had controlled in the jury's award. *Id.* at 2725-26.

1. The common law requires that punitive damages in a tort action be directed only at the conduct of the defendant that gave rise to the tort claim.

As noted above, American jurisdictions uniformly permit the imposition of punitive damages in tort actions, provided a certain threshold of enmity is met. State standards for punitive liability include such commonplace epithets as "maliciously" or "willfully or wantonly" or "with flagrant indifference". *See generally* Meyers & Barrus, Punitive Damages in Products Liability Cases: A Survey, 51 Ins. Couns. J. (1984) (cataloguing state standards). In each instance, the label characterizes the defendant's state of mind specifically with respect to the tortious conduct that is the subject of the civil action. *See generally,* Restatement (Second) of Torts, § 908(2); Prosser and Keeton, The Law of Torts (5th Ed. 1984), § 2, pp. 9-10.

Further, American common law holds that punitive damages can be awarded only when the defendants' conduct gives rise to a cause of action sounding in tort, and only when that tort caused actual damage, including nominal damages. That is, no independent cause of action for punitive damages has been recognized in American jurisdictions. *See* Restatement (Second) of Torts, § 908 and comments b. and c.; cf. Prosser & Keeton, at § 2, at p. 14.

In Ohio, punitive damages are properly awarded only to punish conduct characterized by (1) hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Murty*, 32 Ohio St. 3d 334, 512 N.E.2d 1174 (1987). The conduct to be punished must also cause compensable harm. *Shimola v. Nationwide*

Ins. Co., 25 Ohio St. 3d 84, 495 N.E.2d 391 (1986); *Bishop v. Grdina*, 20 Ohio St. 3d 26, 28, 485 N.E.2d 704 (1985).[12]

The rule regarding compensable harm requires, among other things, "proof of actual damages flowing" from the alleged misconduct before that misconduct can be considered an appropriate subject for an award of punitive damages. *Bishop*, 20 Ohio St. 3d at 28. The logic of this rule is simple: a tort action focuses on wrongful conduct that causes harm. If a tort plaintiff establishes the elements of the tort, the jury can award the plaintiff compensatory damages for the injuries caused by the tort. If, irrespective of the particular mental state that is defined as an element of the tort,[13] the tort was in fact committed with the requisite level of enmity – in Ohio, hatred, ill will or a spirit of revenge – then punitive damages may be awarded. If, on the other hand, the tortious conduct allegedly warranting punitive damages did not cause compensable harm, then an award of punitive damages is precluded.

Simply stated, then, the law of American jurisdictions is that punitive damages are available in a tort action when the plaintiff proves the tort he has pleaded, proves that tort was committed with ill will, and proves an element of actual damages, even if only nominal. That common law is well-settled and it is uniform, (or was until the Supreme Court of Ohio departed from it in this case). *See* Restatement (Second) of Torts, § 908, Comment c ("It is essential, however, that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action."); Prosser & Keeton,

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[12] The jury instruction on punitive damages, which appears at App. 147-148, is an accurate statement of Ohio law on these points. It did not contain an express requirement that the punitive damages be directed at the tortious conduct that the jury had found defendant to have committed. Because this requirement is a threshold legal matter, it was properly raised in defendants' motion of directed verdict at the close of plaintiff's case and at the close of the evidence. (R. 676-80.)

[13] Punitive damages are recoverable for strict liability torts, where no state of mind need be shown, for negligent torts and for intentional torts. Cf. *TXO*, 113 S.Ct. at 2726 (Kennedy, J., concurring in part and in the judgment).

at 11 ("But it is not so much the particular tort committed as the defendant's motives and conduct in committing it which will be important as the basis of the award.").

The rule announced by the Ohio Supreme Court is a naked, unique departure from this rule. It has no antecedent in Anglo-American law.[14] Indeed, throughout this litigation, Moskovitz has failed to identify a single authority that advances or supports the view that punitive damages can be awarded in a tort action for conduct other than that giving rise to the tort cause of action. And, critically, a recent comprehensive scholarly survey of American law on remedies for claimed spoliation of evidence failed to identify a single jurisdiction that recognizes punitive damages within the underlying civil action as an appropriate remedy. Katz and Muscaro, Spoilage of Evidence – Crimes, Sanctions, Inferences, and Torts, 29 Tort & Insurance Law Journal 51 (1993).[15]

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[14] The Supreme Court of Ohio's reference to *Spadafore v. Blue Shield*, 21 Ohio App.3d 201, 486 N.E.2d 1201 (1985), as precedent for its wayward ruling is starkly false. In *Spadafore*, the plaintiff sued an insurance company for bad faith. In connection with that cause of action, the plaintiff introduced some evidence that, in the course of the defendant's bad faith handling of the claim, it intentionally altered documents. Thus, the course of the insurance company's bad faith conduct, which gave rise to compensable harm, included alteration of records.

[15] The Article surveys the remedies recognized in other jurisdictions for spoilage or destruction of evidence. "All courts generally recognize the standard statutory and equitable remedies available to victims of spoliation of evidence. The commentators agree that there are three general and nationally similar sources for "compensating" a victim who has lost evidence to spoliation: (1) state criminal sanctions * * * ; (2) civil discovery sanctions * * * ; and (3) the spoliation inference." 29 Tort & Insurance Law Journal at 52. The article makes clear that the remedy in Ohio for such claimed spoilage is a separate cause of action asserting the tort of spoilation of evidence, which the Ohio Supreme Court recognized in *Smith v. Howard Johnson Co. Inc.*, 67 Ohio St. 3d 28, 615 N.E.2d 1057 (1993). And as the dissenters in the Supreme Court of Ohio correctly observed, punitive damages would be available in such an action. (App. 55.)

Indeed, the rule is so fundamental to American tort law that it pervades, almost unwittingly, the expression of the most obvious legal principles, and is virtually never the subject of explication. *E.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) ("Under Mississippi law, the jury may award punitive damages for any common law tort committed with a certain mental state, that is, 'for a willful and intentional wrong, or for such gross negligence as is equivalent to such a wrong.' "); *see also* Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Virginia L. Rev. 139, 141 (1986) ("The usual allegation was that defendants' tortious conduct had been motivated by a malicious or spiteful desire to injury the plaintiff. The jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award.").

The elementary logic that undergirds this rule is set forth lucidly in *James v. Public Finance Corp.*, 47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670, 673 (1975), where the California Court of Appeals explained the controlling decision of *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505 (1932):

> The *Clark* court reasoned that the general rule requiring plaintiff to show that he has sustained actual damages is solely because he must prove that the defendant has committed a 'tortious act' before he may be entitled to recover exemplary damages. To establish that there was a 'tortious act', plaintiff must, of course, prove not only the existence of an actionable wrong, but also that damages resulted therefrom. [Citations omitted.] The concurrence of both an actionable wrong and damages are necessary elements for a cause of action. Exemplary damages, where recoverable, are deemed to be 'mere incidents to the cause of action and . . . not the basis thereof.'

215 Cal. at 282, 9 P.2d at 505.

2. The common-law requirement is essential to the constitutional validity of punitive damage awards.

The common-law requirement described above affords a critical safeguard in the procedures governing punitive damages. Indeed, the requirement is exactly what saves those procedures from constitutional infirmity.

Punitive damages are, by any measure, punishment, and they therefore have a singular standing in civil litigation. "Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' " *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).[16]

If the system for imposing punishment in the form of damage awards in civil litigation were to be analyzed in isolation from its common-law lineage, it would be subject to strenuous attack in several respects. If the awards are viewed as punishment, the process for imposing them falls drastically short of the procedural safeguards erected in other punitive contexts. In a more limited vein, the standards for imposition of punitive damages, discussed above, are general and highly malleable. Imposition of punishment on the basis of such imprecise standards grates against constitutional norms for notice and consistency.

Arguments along these lines have been raised in and rejected by this Court. *Haslip*, 499 U.S. at 23-24, nn. 11, 12. In rejecting the arguments, the Court has expressly relied on

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[16] See also *Memphis Community School District v. Stachura*, 477 U.S. 299, 306 n. 9 (1986) ("[t]he purpose of punitive damages is to punish the defendant for his willful behavior"); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (punitive damages are " 'quasi-criminal' " and "punitive 'fine[s]' " that provide a "windfall to plaintiffs").

"the procedural and substantive protections" that constitute the common-law methodology for imposition and review of punitive damages. *Id.*, 499 U.S. at 23, n. 11. *See also TXO*, 113 S.Ct. at 2721-22, *Id.* at 2726-28 (Scalia and Thomas, JJ., concurring in the judgment).

Of course, a State may depart from common-law legal methods without automatically offending due process. But, when, as is the case with the constitutionality of punitive damage regimes, this Court has rejected due process challenges expressly because of the substantive and procedural safeguards embodied in the common law, one must identify what those common-law safeguards are, and what would be the constitutional import of dispensing with them, as Ohio has done.

Most critically, the imposition of punitive damages under common-law rules is restrained by the essential prerequisite that the jury (or judge) must first find that the defendant committed the tortious act that plaintiff has alleged. That finding is controlled by the terms of the jury instructions (or the settled substantive law as the judge, acting alone, would apply it).

This structure of adjudication is the crystallized essence of due process: a fact-finder operates within the constraints of articulated law in applying that law to the evidence. That structure serves the elemental goals of predictability and consistency in the administration of justice. The common-law requirement that punitive damages be awarded only for tortious conduct that has actually been adjudicated anchors the entire process to a body of coherent substantive and procedural law. Without that anchor, juries would be entirely free to pursue their personal predilections, a condition that unmistakably offends the Due Process Clause. *Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 575 (1974).

It is, therefore, no accident that the rule announced by the Ohio Supreme Court in this case sets Ohio apart from all other American jurisdictions, and casts Ohio adrift from the very common-law traditions that have properly shielded the punitive damage regimes of other States from the myriad

recent attacks in this Court. Just as this Court has repeatedly, and wisely, ceded such vast authority to States when they adhere to the time-honored precepts of the common law, so too has it cast a most skeptical eye upon departures from such precepts. Indeed, in its assorted attempts to articulate the background notions of due process, the Court has repeatedly looked to the historical practices of the common law and to the resonance those practices accumulate across the sweep of history.[17]

That background, in turn, renders deviations from universal common-law practices particularly subject to Due Process attacks. As was true with the practice reviewed in *Schad*, Ohio's rule of permitting a jury to impose punitive damages for allegedly wrongful conduct that has not been itself the subject of any adjudication "finds no analogue in history or in the law of other jurisdictions." 501 U.S. at 640. Given "the importance of history and widely shared practice as concrete indicators of what fundamental fairness and rationality require", *ibid.*, Ohio's decision to permit punitive damage awards without any connection between the award and the defendant's actionable conduct is an egregious violation of the Due Process Clause.

First, under Ohio's rule, a jury will be free to impose punitive damages for conduct that it finds offensive, even though it has not been instructed on the legal standards

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[17] Thus, for example, in grappling to add meaning to the idea of "fundamental fairness", *Lassiter*, 452 U.S. at 25, that imbues the guaranty of Due Process, the Court has stated that legal processes must be consonant with "ordinary notions of fair play and the settled rules of law", *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926), or must accord with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Where, as here, American jurisdictions adhere, virtually unanimously, to a common-law rule, "such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *In re Winship*, 397 U.S. 358, 361-62 (1970) quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

applicable to the conduct.[18] Indeed, the conduct punished by the jury need not even be tortious under Ohio's rule; it need only be characterized by enmity, *Preston*, 32 Ohio St. 334, and be offensive to the particular jury. In the absence of the common law's required connection between the actionable conduct and the punitive award, then, the jury's determination whether to punish will be tied to nothing other than the jury's untrammelled discretion: it will be enough that there was some evidence in the case from which a jury could conclude that the defendant was in need of punishment. Conferring on the trier of fact that breadth of arbitrary and unreviewable power is incompatible with the Constitution. *Kollender*, 461 U.S. at 358; cf. *Coates v. Cincinnati*, 402 U.S. 611 (1971).

Second, neither the pleadings in the case nor the jury instructions will provide the defendant with notice of the actions for which he may be punished by the jury. The plaintiff need not plead a cause of action directed at the conduct for which punitive damages are sought. Further, because punitive damages can be awarded under the Ohio rule for conduct that is not itself tortious, the defendant will have been given no prior notice in any form that his "misconduct" may subject him to liability. The imposition of punishment without some form of advance notice is incompatible with fundamental values of due process. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Connally v. General Construction Company*, 269 U.S. 385 (1926).

Third, a defendant who has misbehaved will have no protection from repeated imposition of punishment for the same behavior. The protections that arise from the doctrine of res judicata will be of no avail under Ohio's rule. The plaintiff will be precluded, and the defendant protected, only from further litigation of the tortious conduct that has been adjudicated. Because there is no formal adjudication of the conduct

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[18] In this case, Moskovitz did not request and the jury did not receive any instruction on the legal standards relating to spoliation of evidence, or on any other legal standard relating to the duties of a physician with respect to maintenance of medical records, before or during litigation.

that was punished by punitive damages the defendant is subjected to potentially unlimited and repeated punitive liability for the same action.[19]

In short, the common-law methods regarding imposition of punitive damages comport with due process in large measure because they adhere to a time-honored rule of adjudication that promotes notice, clarity, certainty, and finality, values that have constitutional import. When the common-law method is stripped of these essential components, the State is left with a haphazard process without any claim to common-law origins, or any other source of legitimacy.

Even more fundamentally, however, the Ohio rule utterly confounds any chance that judicial review, whether in the trial court or on appeal, could lend the requisite degree of regularity to punitive awards entered under the rule. *See Haslip*, 499 U.S. at 20-23 (reviewing post-trial review procedures); *TXO*, 113 S.Ct. at 2727 (Scalia and Thomas, JJ., concurring in judgment) (finding that " 'procedural due process' requires judicial review of punitive damages awards for reasonableness").

Under the common law, the formal structure for adjudication of the claimed tort, including compensatory and punitive damages, provides a structure in which judicial review is possible. Indeed, it is the essence of judicial review to survey the record and assess the record against the prevailing legal standards, as embodied in the jury instructions or in the trial court's conclusions of law. The orthodox work of appellate review consists of precisely that form of analysis. And in that analysis, it is hardly remarkable that judgments are set aside when proof of the predicate for damages is absent, or when

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[19] In this case, for example, the plaintiff below would presumably be free now to pursue a claim of spoliation of evidence against the defendant under the theory approved by the Ohio Supreme Court in *Smith v. Howard Johnson*, and in that action could obtain yet another award of punitive damages. And there is no judgment that defendants below could marshall to establish the defense of res judicata. They would have to rely instead on the surmises and sympathies of the Ohio judiciary.

the award of damages is insufficiently related to the defendant's wrongful conduct. Indeed, appellate review along those lines is routine in American law.

Under the Ohio rule adopted in this case, however, that routine, orthodox, and constitutionally required judicial review is rendered impossible. Without any required connection between the claimed tort that was adjudicated by the jury and the claimed misbehavior giving rise to the award of punitive damages, what will the reviewing judicial authority review? There is no required articulation in the jury instructions of the standards for determining whether the claimed misbehavior is actionable, or even that it occurred. Where the jury is not instructed on a matter, a reviewing court by definition cannot know on what legal basis the jury may have acted. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989).

There is likewise no legal standard against which a reviewing court can evaluate the sufficiency of the evidence. There is no connection between compensatory and punitive damages, because those damages are directed at entirely different acts, so there can be no principled assessment of the relationship between them. Nor, as described below, can a reviewing court judge the award's excessiveness or proportionality, because it cannot know what the conduct was that gave rise to the award.

In short, there can be no meaningful judicial review of any aspect of the punitive damage award. Without that feature of the process, the judicial review of punitive damages that is an essential feature of Due Process is absent. In the absence of judicial review, the historical legitimacy of any regime for awards of punitive damages necessarily fails.

3. To the extent the Due Process Clause requires federal constitutional review of claimed excessiveness, the Ohio rule effectively prevents such review.

The nature of the review of punitive damage awards that is required by the Due Process Clause of the Fourteenth

Amendment remains unclear. If the review is purely procedural, focused exclusively on the extent to which the State procedure adheres to common-law methodology, the preceding section makes clear that Ohio's rule offends the Due Process Clause because of the State's marked departure from settled American common law.

If, in addition, the review has a substantive component, Ohio's rule is only all the more flawed. The due process review for excessiveness, or proportionality, cannot be conducted when the punitive damage award is untethered to any adjudicated tortious conduct. The most obvious difficulty is that the reviewing court cannot know with certainty the conduct that the jury intended to punish. It can know that the jury found the defendant liable for a tort, but it cannot know whether, and to what degree, that adjudicated tort provoked the punitive damage award.

More fundamentally, the evaluation of proportionality will necessarily founder on the indeterminacy of the punitive damage process. *First*, the evaluation of the proportions between compensatory and punitive damages will make no sense whatever, because the two forms of damages will be directed at entirely different behavior. In that circumstance, the very concept of proportionality is devoid of content. The tort will have caused compensable harm; otherwise, under the common-law rule, it is not actionable. The other misbehavior, which has not been adjudicated, and which is not subject to any articulated legal norms, need not have caused any such compensable harm, however. The essential relationship that undergirds an evaluation of proportionality, therefore, is missing. There is thus nothing left to analyze, only two numbers, bearing no logical or legal relationship to each other except for the essentially coincidental fact that the same jury announced them.

Second, and equally damning, the excessiveness review involving assessment of the award in a particular case against awards in other cases, or those imposed by statute, cannot be conducted either. A reviewing court may survey awards in earlier cases, but that survey will not yield any information about the nature of the misconduct that was purportedly

punished by the punitive damage award. Under the common-law rule, the reviewing court can know with certainty what conduct was punished in earlier cases by reviewing the jury's adjudication of the plaintiff's tort claim in the earlier case. The complaints and the jury instructions in that case will yield dispositive information about what tort was tried and adjudicated to have been committed. From that information, the common-law rule permits the reviewing court to know precisely what the earlier jury intended to punish.

Under Ohio's rule, however, that knowledge is impossible. One might review the transcript of an earlier case to see what evidence of what other "bad acts" was admitted, or one might review the closing arguments to see where plaintiff's counsel directed the jury's attention. Even with that elaborate labor, however, the reviewing court is left with nothing but surmise as to the subject of the punitive award. From such a feeble foundation, a reviewing court will proceed falteringly if at all to assess whether earlier awards, the focus of which has been determined by guesswork at best, fall in line with the award in the case under review, which itself can be understood only dimly by difficult extrapolation.

This would not be due process. These steps of lurching conjecture would not even deserve the word "process" – they would be little more than a series of speculations, tied together by whim. If the Fourteenth Amendment involves a right to substantive review of punitive damage awards for excessiveness, that right is entirely denied by Ohio's rule.

C. Conclusion

Haslip and *TXO* articulate certain principles regarding the constitutionality of State punitive damage schemes. At a minimum, those decisions establish that the common-law methodology for imposition of punitive damages is entitled to vast deference, and that adherence to the common-law methodology provides forceful protection against claims of federal due process violations.

Ohio's rule, announced by the Ohio Supreme Court in this case, is a striking departure from the common law. That

departure is a federal constitutional violation because it strips Ohio's procedures of precisely the protections that this Court has repeatedly announced are essential to the constitutional legitimacy of a punitive damages scheme.

When a practice is firmly rooted in the historical traditions of the common law, that practice is entitled to the profound deference reflected in the controlling opinions in *Haslip* and *TXO*. Having severed its connection with those traditions as they define the methods for imposing punitive damages in civil litigation, Ohio has forfeited the comfort that history confers. Its radical punitive damages regimen, devoid of the very common-law procedures and safeguards that would ensure its constitutionality, violates the Due Process Clause of the Fourteenth Amendment.

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE IMPOSITION OF PUNISHMENT ON A PERSON FOR ACTS THE PERSON HAS NOT BEEN FOUND TO HAVE COMMITTED.

The discussion above shows that Ohio has departed radically and impermissibly from the essential features of due process relating to the imposition of punitive damages. That conclusion flows ineluctably from an understanding of the saving features of the common-law punitive damages method, and how those features have affected this Court's review of constitutional challenges to punitive damages awards.

Entirely apart from that conclusion, however, Ohio's rule offends the Due Process Clause for an immediate, basic and stunningly obvious reason: Ohio's rule permits the imposition of punishment for an act without requiring that the defendant first be found to have committed the act. No concept of fundamental fairness, indeed no concept of the rule of law, can abide such a topsy-turvy approach.

The entire structure of Anglo-American law orders adjudication in a simple, sensible way: liability is determined first, then punishment. This is so in criminal process, and it is so in civil process.

In the context of criminal punishments, the Court has said simply "[a]s he was not convicted, he may not be punished." *Jones v. United States*, 463 U.S. 354, 369 (1983); accord *Foucha v. Louisiana*, 112 S.Ct. 1780, 1781 (1992). The principle, of course, has broader application. Indeed, it pervades this Court's precedents.

Thus, for example, civil confinement is "improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." *Vitek v. Jones*, 445 U.S. 480, 492 (1980). Similarly, a person cannot be held in civil confinement after his criminal sentence is fully served without there first being a further adjudication under articulated rules. *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972)[20]. A person subjected to such adjudication is entitled to constitutionally adequate procedures. *See, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972).

These settled rules have ready application to the processes of civil litigation. A State may, for example, establish its body of tort law, and deem certain actions tortious, and therefore subject to civil action and, where tortious conduct is established, the State may permit an award of damages. Certainly, however, a State could not permit an award of tort damages without requiring the plaintiff first to prove that the tort had been committed. Similarly, a state may define the situations in which punitive damages are available. It is at liberty to create a rule under which punitive damages are available in all or a subset of tort actions, and to articulate the requisite state of mind.

What may not be done is exactly what Ohio has done: to permit an award of punitive damages for conduct without requiring that the plaintiff prove the wrongful conduct

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[20] Even in the extraordinary circumstance of pretrial detention, the Court has required a judicial determination that the detainee falls within the defined category of persons subject to that detention. *United States v. Salerno*, 481 U.S. 739 (1987).

occurred. The entire structure of American tort law is predicated on the orderly adjudication of causes of action, requiring first proof of the tortious act, and then proof of damages. Both bodies of proof must be marshalled against the extant legal standards for evaluating that proof: the tort claim against the State's definition of the elements of the tort, and the damage claim against the State's rules regarding causation and related considerations.

This structure of adjudication inherently conveys the fundamental precept that adverse judicial action directed at a defendant's conduct will not be countenanced without a determination first that the conduct occurred. *Vitek*, 445 U.S. at 490-91, quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (when adverse action is directed at specified behavior, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process . . . must be observed.")

The petitioner in this case was subjected to an award of punitive damages for allegedly altering the medical records of plaintiff's decedent. No determination was ever made, however, that the claimed behavior did in fact occur. The judgment on the jury's verdict certainly did not adjudicate the matter, since the pleadings and evidence were directed wholly to plaintiff's claims of medical negligence in the treatment of decedent, rather than addressing the alleged spoliation of evidence. (App. 54.) Similarly, the instructions to the jury contained nothing that required, or even invited, such a finding as a prerequisite to an award of punitive damages.[21]

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[21] As already described, the absence of any adjudication regarding the fact of spoliation is also what permits the separate due process violation of exposing the defendant to repeated and cumulative punitive awards for the same conduct. Because there is no adjudication as to whether the claimed conduct took place, the judgment awarding punitive damages cannot have res judicata effect as to the claim. But, as described here, the absence of any requirement of a finding or adjudication regarding the conduct under the Ohio rule is subject to the even more fundamental flaw

In short, in this case, there was no adjudication that the conduct claimed to warrant punishment in fact took place. As the dissent in the Ohio Supreme Court pointed out, the claim of spoliation was "hotly disputed" by Dr. Figgie. And, as the dissent continued, "[a]s is true with the determination of any significant fact, it was the province of the jury to make a finding and return a verdict on the issue of the alleged spoliation of evidence." *Ibid.* Without such a finding and verdict as a prerequisite to an award of punitive damages, the award cannot stand because it offends the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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that it permits the imposition of punishment without any judicial determination that the conduct claimed to warrant punishment ever occurred.

The Supreme Court of Ohio

1994 TERM — To wit: July 27, 1994

Aaron Moskovitz, Appellant, v. Mt. Sinai Medical Center et al. [Harry E. Figgie III, M.D., et al., Appellees.]	Case No. 93-278 JUDGMENT ENTRY APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is remanded consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellees his costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

COSTS:

Docket Fee, $40.00, paid by Charles Kampinski.

Printing of Record, $4,590.49, paid by Charles Kampinski.

(Cuyahoga County Court of Appeals; Nos. 60464 & 61166)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

(Cite as: 69 Ohio St.3d 638, 635 N.E.2d 331)

MOSKOVITZ, Exr., et al., Appellants,

v.

MT. SINAI MEDICAL CENTER et al.; Figgie et al., Appellees.

No. 93-278.

Supreme Court of Ohio.

Submitted March 2, 1994.

Decided July 27, 1994.

Syllabus by the Court

1. In a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of "actual malice" as that term is defined in the syllabus of Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174. An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm.

2. In prejudgment interest determinations pursuant to R.C. 1343.03(C), the phrase "failed to make a good faith effort to settle" does not mean the same as "bad faith." (Kalain v. Smith [1986], 25 Ohio St.3d 157, 25 OBR

201, 495 N.E.2d 572, followed; Villella v. Waikem Motors, Inc. [1989], 45 Ohio St.3d 36, 543 N.E.2d 464, modified.)

3. In an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of the contents of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered.

4. An order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of "final order" set forth in R.C. 2505.02. Such an order does not determine the action or prevent a judgment, nor is it rendered in a special proceeding. Thus, an appeal from such an order must await final judgment in the prejudgment interest proceeding. (Bell v. Mt. Sinai Med. Ctr. [1993], 67 Ohio St.3d 60, 616 N.E.2d 181, modified.)

This is a case involving medical malpractice and the death of an elderly woman, Mrs. Margaret Moskovitz. The facts giving rise to this appeal involve the conduct of Dr. Harry E. Figgie III, appellee, who failed to timely diagnose and treat a malignant tumor on Moskovitz's left leg and altered certain records to conceal the fact that malpractice had occurred.

In 1978, Moskovitz was treated by Edward H. Gabelman, M.D., for a tumor on her left leg. The tumor was removed and found to be benign. In 1984, Gabelman completely and successfully removed a second mass from Moskovitz's left leg. This mass was found to be a low-

grade malignant dermatofibrosarcoma protuberans. Gabelman performed the 1984 surgery at Mt. Sinai Medical Center ("Mt. Sinai").

In 1985, Moskovitz was referred to Dr. Figgie, an orthopedic surgeon, for treatment of a degenerative arthritic condition in her knees. Figgie was employed by University Orthopaedic Associates, Inc. ("University Orthopaedic"), and specialized in prosthetic joint replacements and degenerative diseases. In October 1985, Figgie performed surgery upon Moskovitz at University Hospitals of Cleveland ("University Hospitals"), replacing Moskovitz's knee joints with artificial knee joints. In May 1986, Moskovitz underwent additional knee surgery performed by Dr. Figgie. Between May and August 1986, Moskovitz visited Figgie's office on a number of occasions due to complications arising from the knee surgeries.

On October 2, 1986, Moskovitz visited Dr. Figgie's office, complaining of a lump on her leg. Figgie examined Moskovitz and detected "a small calcified lesion along the tendoAchilles." Figgie did not recommend a biopsy of the lesion and reassured Moskovitz that nothing was wrong. Figgie was aware that tumors had been removed from Moskovitz's left leg in 1978 and 1984.

On November 3, 1986, Moskovitz was admitted to University Hospitals for a right knee revision. Prior to surgery, Moskovitz was examined by Rick Magas, a registered nurse. Magas's written report of the examination, signed by Dr. Figgie, noted the existence of a firm nodule measuring one centimeter by one centimeter on Moskovitz's left Achilles tendon. Figgie performed the

right knee revision on November 5, 1986. Following surgery, Moskovitz was examined on Figgie's behalf by Dr. G. Balourdas, a resident physician at University Hospitals. A discharge summary prepared by Balourdas (and signed by Figgie) noted the existence of a "[l]eft Achilles tendon mass, [1] x 1 cm. nodule." The report indicated that the mass had been present for some time.

Moskovitz continued to see Dr. Figgie through November 1987. On November 10, 1987, Figgie finally removed the mass that had been growing on Moskovitz's left leg.[1] On November 13, 1987, the tumor was found to be an epithelioid sarcoma, a rare form of malignant soft-tissue cancer. A bone scan revealed that the cancer had metastasized to Moskovitz's shoulder and right femur.

Immediately following the diagnosis of cancer, Moskovitz's care was transferred to Figgie's partner at University Orthopaedic, Dr. John T. Makley, an orthopedic surgeon specializing in oncology. At that time, Makley received Figgie's original office chart, which contained seven pages of notes documenting Moskovitz's course of treatment from 1985 through November 1987. Makley thereafter referred Moskovitz to radiation therapy at University Hospitals. Apparently, in November 1987, without Figgie's knowledge, Makley sent a copy of page seven of Figgie's office notes to the radiation department at University Hospitals.

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[1] The record reveals that in November 1986, the mass measured approximately one centimeter by one centimeter in size. The tumor had doubled in size by September 1987 and continued to grow until it was finally removed in November 1987.

In December 1987, Figgie or someone on his behalf requested that Dr. Makley return Figgie's office chart pertaining to the care of Moskovitz. In December 1987, Makley was Moskovitz's primary treating physician and Figgie was no longer directly involved in Moskovitz's care and treatment. On December 14, 1987, Makley's secretary forwarded the chart to Figgie's office. Figgie's secretary then sent a copy of the chart to Dr. Zev Ashenberg, Moskovitz's psychologist. The copy was received by Ashenberg sometime between December 14 and 18, 1987. In January 1988, Makley's secretary requested that Figgie's office return the chart to Makley. At this time, it was discovered that the original chart had mysteriously vanished, never to be seen again.

In February 1988, Makley amputated Moskovitz's left leg. In May 1988, while obtaining a prosthesis for her leg, Moskovitz accidentally fell and broke her right hip due to the cancer having spread to her hip bone. Moskovitz was taken to Hillcrest Hospital and was treated for her injuries. Thereafter, Moskovitz underwent chemotherapy at Hillcrest Hospital.

On October 21, 1988, Moskovitz filed a complaint for discovery in the Court of Common Pleas of Cuyahoga County, seeking to ascertain information relative to a potential claim for medical malpractice. On November 4, 1988, Moskovitz and her husband, Aaron Moskovitz, filed an amended complaint against, inter alia, Figgie, Makley, University Orthopaedic, University Hospitals, Gabelman and Mt. Sinai. The amended complaint set forth allegations of medical malpractice against Figgie and others for failing to timely diagnose and treat Moskovitz's cancer before the cancer had metastasized.

The amended complaint further alleged that Makley committed medical malpractice by unnecessarily removing Moskovitz's left leg after the cancer had already spread. In addition, Moskovitz and her husband set forth claims of negligent hiring against University Hospitals and Mt. Sinai.

On December 5, 1988, Moskovitz died as a result of the cancer. Prior to her death, Moskovitz's testimony was preserved by way of videotaped deposition.

Makley was deposed on January 30, 1989. At his deposition, Makley produced a copy of page seven of Figgie's office chart. (That copy was identical to the copy ultimately recovered by plaintiff's counsel from the radiation department records at University Hospitals.) The copy produced by Makley contained a typewritten entry dated September 21, 1987, which states: "Mrs. Moskovitz comes in today for her evaluation on the radiographs reviewed with Dr. York. He was not impressed that this [the mass on Moskovitz's left leg] was anything other than a benign problem, perhaps a fibroma. We [Figgie and York] will therefore elect to continue to observe." However, the photostatic copy revealed that a line had been drawn through the sentence "We will therefore elect to continue to observe." The copy further revealed that beneath the entry, Figgie had interlineated a handwritten notation: "As she does not want excisional Bx [biopsy] we will observe." The September 21, 1987 entry was followed by a typewritten entry dated September 24, 1987, which states: "I [Figgie] reviewed the x-rays with Dr. York. I discussed the clinical findings with him. We [Figgie and York] felt this to be benign most likely a fibroma. He [York] said that we could observe and I concur." At some

point, Figgie had also added to the September 24, 1987 entry a handwritten notation, "see above," referring to the September 21 handwritten notation that Moskovitz did not want an excisional biopsy.

Figgie was deposed on March 2, 1989. At his deposition, Figgie produced records, including a copy of page seven of his office chart. As his original chart had been lost in December 1987 or January 1988, Figgie had had this copy made *from the copy of the chart that had been sent to Ashenberg in December 1987*. The September 21, 1987 entry in the records produced by Figgie did not contain the statement "We will therefore elect to continue to observe." Apparently, that sentence had been deleted (whited-out) on the original office chart from which Ashenberg's copy (and, in turn, Figgie's copy) had been made, in a way that left no indication on the copy that the sentence had been removed from the original records.

During his deposition, Figgie maintained that he did not discover the mass on the left Achilles tendon until February 23, 1987, and that Moskovitz had continually refused a workup or biopsy. To support these claims, Figgie produced copies of his secretary's notebooks, which contained messages of telephone calls received by Figgie's office from Moskovitz during the course of her treatment. One entry appearing in the telephone logs indicates that Moskovitz called Figgie on February 26, 1987. The secretary's entry in the notebook states: "Moskovitz, *right foot*, coming in today." (Emphasis added.) Dr. Figgie's pencilled-in notation beside that message reads: "Patient seen, refuses workup, *left foot*, workup *left foot*." (Emphasis added.) The telephone logs also contained an entry for May 5, 1987, indicating that

Moskovitz had called Figgie's office that day complaining of pain in her left leg. Figgie's pencilled-in notation regarding the May 5 entry states that Moskovitz refused to have the tumor biopsied. However, an entry in the telephone logs for September 11, 1987, indicates that Moskovitz had called Figgie, complaining of the lump on her left leg. Figgie's pencilled-in notation next to that entry states that Moskovitz had agreed to a workup on September 11, 1987. The September 11 notebook entry was directly contradictory to the handwritten alterations made by Figgie to the September 21 entry on page seven of the office chart.

During discovery, another copy of page seven of Figgie's office chart (identical to the copy produced by Makley during his deposition) was recovered from the radiation department records at University Hospitals.[2] This copy had been received by the radiation department in November 1987, when Moskovitz was referred to radiation therapy by Dr. Makley. Therefore, it became apparent that the final sentence in the September 21, 1987 entry had been deleted (whited-out) from Figgie's original office chart sometime between November 1987 (when the radiation department obtained a copy of the record) and mid-December 1987, when Ashenberg received a copy of the record from Figgie's office. Presumably, that alteration occurred in December 1987 while the original chart was in the possession of Dr. Figgie.

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[2] We surmise from the information before us that the copy of page seven Makley produced at his deposition was made from the copy in the radiology department records at University Hospitals.

All versions of the September 21, 1987 entry obtained during discovery contained the handwritten notation by Figgie "As she does not want excisional Bx [biopsy] we will observe." That sentence clearly suggested that it was Moskovitz's choice not to have the tumor biopsied during the course of her treatment with Figgie, whereas the typewritten text as it originally appeared in the September 21, 1987 entry indicated that it was Figgie's decision to observe the growth because the tumor was thought to be benign.

Eventually, Figgie's entire office chart was reconstructed from copies obtained through discovery. The reconstructed chart contains no indication that a workup or biopsy was recommended by Figgie and refused by Moskovitz at any time prior to August 10, 1987.[3] Entries in the reconstructed chart for October 2, 1986, February 23, 1987 and May 7, 1987, refer to the mass, but do not mention a suggested biopsy or the refusal of a biopsy. Additionally, none of the typewritten entries appearing in the reconstructed chart indicates that a workup or biopsy was recommended or refused after August 10, 1987, with the exception of a September 29, 1987 entry, which states that Figgie recommended a biopsy and Moskovitz "did not want to proceed" with a biopsy at that time.

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[3] An August 10, 1987 entry in the reconstructed chart states: "Mrs. Moskovitz returns today. She has had some increase in that swelling and that mass behind her ankle. She is not particularly tender and it appears to be calcific. She did not want to proceed with radiographs or work-up today. We did discuss the possibility of needle or incisional biopsy but she deferred on this."

In her videotaped deposition, Moskovitz claimed that she never refused to have the tumor biopsied. According to Moskovitz, Figgie had repeatedly assured her throughout the course of her treatment that the lump on her left Achilles tendon was merely "tendons."

Following Moskovitz's death, Aaron Moskovitz, executor of Moskovitz's estate, appellant, was designated as plaintiff in the lawsuit in his capacity as executor. In April 1989, a second amended complaint was filed (against all the defendants named in the first amended complaint) to include claims for wrongful death and survivorship. Additionally, appellant asserted allegations against Figgie and University Orthopaedic for punitive damages based upon the alteration of records.

The matter was referred to nonbinding "arbitration"[4] in accordance with R.C. 2711.21 and local rules of court. However, the trial court ordered that the issue of punitive damages was not to be considered at the "arbitration" hearing. On December 7, 1989, the three-member "arbitration" panel issued its findings and "award." The panel found in favor of all defendants participating in that proceeding (including Makley), with the exception of Figgie and University Orthopaedic. The panel made the following findings regarding Figgie:

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[4] In *Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St.3d 708, 711, 590 N.E.2d 1242, 1245*, the plurality opinion stated that: " 'Nonbinding arbitration' is a contradiction in terms. For a dispute resolution procedure to be classified as 'arbitration,' the decision rendered must be final, binding and without any qualification or condition as to the finality of an award * * * ."

"3.) * * * The evidence supported a finding that plaintiffs' [sic] decedent had a very good chance of long term survival if the tumor was found to be malignant at a time when it was less than one centimeter in size. The evidence supported the fact that the tumor had not grown in size as of May 7, 1987. If Dr. Figgie had performed a biopsy prior to this date, the cancer would not have metastasized and the decedent would have recovered.

"4.) Dr. Figgie failed to recommend at the appropriate time that the growth on the decedent's left ankle be worked up to determine whether or not it was a malignant tumor. The plaintiff testified [by videotaped deposition] he never made such a recommendation to her. Dr. Figgie's office chart, which is the primary reference material in analyzing a physician's conduct, is filled with contradictions and inconsistencies. The panel did not find Dr. Figgie's deposition persuasive in explaining or providing a basis for justifying these irregularities. His secretary's telephone notes were of questionable probative value.

"5.) Even if Dr. Figgie was first informed of the growth on February 23, 1987, he still fell below acceptable standards of care because he did not conduct further investigation till [sic] x-rays performed in September 1987. *All handwritten entries which appear on or prior to September 24, 1987, indicating that a biopsy was recommended or that the decedent refused further work-up were subsequent changes of the records done to justify Dr. Figgie's conduct.* **The sentence 'We will therefore elect to continue to observe' on the September 21, 1987 entry was whited out and the handwritten entry 'as she dose [sic] not want excisional**

biopsy we will observe' was a subsequent alteration of the records." (Emphasis added.)

Two of the three members of the panel "awarded" appellant $1,352,881.20 in compensatory damages against Figgie and University Orthopaedic. The third member of the panel dissented on the basis that that "award" was too low. The dissent suggested that an "award" of not less than $2 million was warranted and that an award of $5 million would be justified "in light of the facts presented on liability as well as damages." In addition to this award of compensatory damages, the panel separately "awarded" over $2.9 million in hedonic damages.

Figgie and University Orthopaedic filed notices of nonacceptance of the "award." Appellant filed a notice of nonacceptance concerning the panel's findings in favor of Makley. On December 9, 1989, appellant filed a third amended complaint, naming, as defendants, Figgie, Makley and University Orthopaedic. The case proceeded to trial on the third amended complaint. Without objection from any party, the jury was informed of the outcome of the "arbitration" proceeding and a copy of relevant portions of the "arbitration" decision was admitted into evidence for the jury's consideration.[5]

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[5] Although no party has raised the issue, R.C. 2711.21 was amended, effective October 20, 1987, to provide that a decision rendered in an "arbitration" proceeding authorized by that statute is not admissible into evidence at trial. See Am.Sub.H.B. No. 327, 142 Ohio Laws, Part II, 3338-3339. Note that R.C. 2711.21 as it appears in Page's Ohio Rev.Code Ann. (1992) contains a misprint. Specifically, the final paragraph of R.C. 2711.21 should be designated subsection (D).

At trial, Figgie claimed that he first discovered the tumor on Moskovitz's left leg on February 23, 1987, at which time he recommended a workup in order to consider a biopsy. According to Figgie, Moskovitz refused to have the tumor worked up until September 1987 or biopsied until October or November 1987. However, Figgie's reconstructed office chart indicated that the mass had been discovered by Figgie as early as October 2, 1986. Additionally, the hospital records from Moskovitz's November 1986 knee surgery suggested that the tumor should have been discovered by Figgie before February 23, 1987. Specifically, the report of the preoperative examination by nurse Rick Magas (plaintiff's Exhibit 3) and the discharge summary prepared by Dr. Balourdas (plaintiff's Exhibit 5), both of which were signed by Figgie, noted the existence of the lump on Moskovitz's left Achilles tendon in November 1986. The discharge summary also stated that the mass had been present for some time. Moreover, a February 23, 1987 entry in Figgie's reconstructed office chart contains no references to a suggested biopsy or the refusal of a biopsy.

Figgie was questioned extensively concerning the alteration of medical records. Figgie claimed that after the September 21, 1987 entry had been typed from his dictated notes, he reviewed that entry and found it to be inaccurate. Therefore, according to Figgie, he drew a line through the sentence "We will therefore elect to continue to observe," and added a handwritten notation to reflect that Moskovitz had, in fact, refused to have the tumor biopsied. Figgie denied whiting-out any portion of the typewritten text and claimed to have no knowledge concerning who might have altered the chart in that manner.

Figgie admitted that his original office chart had been lost and that certain slides of Moskovitz's tumor had disappeared from Makley's teaching file. Figgie denied any involvement in the loss of any records. Figgie was also questioned concerning the discrepancy between his handwritten notation in the September 21, 1987 entry and the entry appearing in the telephone journals for September 11, 1987. At one point, Figgie admitted that the two entries were "directly contradictory."

Figgie denied that his February 26, 1987 and May 5, 1987 pencilled-in notations in the telephone journals had been fabricated by him to avoid liability. While those notations indicated that Moskovitz had refused a biopsy in February and May 1987, none of the typewritten entries in the chart for February or May 1987 contained any reference to a suggested biopsy or the refusal of a biopsy. Figgie testified that defacing and destroying medical records reflects a conscious disregard for the rights and safety of a patient. Figgie never sought to have the telephone journals admitted into evidence, although he characterized the entries in the journals as part of his medical records pertaining to the care and treatment of Moskovitz.

Figgie's secretary, Linda Kennedy, testified at trial that she may have whited-out the portions of the September 21, 1987 entry to clean up the records before sending copies to other doctors. However, Kennedy had testified at her deposition that she never whited-out any information on Moskovitz's medical records.

The jury viewed Moskovitz's videotaped deposition in which Moskovitz claimed that she never refused to

submit to a biopsy. According to Moskovitz, Figgie had continually reassured her during the course of her treatment that the lump on her left leg was merely "tendons." Aaron Moskovitz also testified that Figgie consistently reassured the decedent that the lump on her leg was just "tendons." According to Aaron, Figgie never recommended a biopsy at any time prior to October or November 1987 and Figgie never informed Mrs. Moskovitz that the lump could be cancerous.

John F. Burke, an economist, testified concerning the value of Moskovitz's services to her family. Burke concluded that the net present value of the loss of services was between $67,506 and $282,614. Burke also testified concerning the loss of income to Aaron Moskovitz as a result of Mrs. Moskovitz's death. According to Burke, the present value of Social Security benefits the decedent would have received over Aaron's remaining projected life span and the value of a yearly stipend the decedent had been receiving from Germany amounted to $22,891 and $30,521, respectively.

Moskovitz's family members testified concerning the losses they suffered and will continue to suffer as a result of Moskovitz's death. Moskovitz's husband and children witnessed the ravaging effects of the cancer during the final year of Moskovitz's life. As a result of the cancer, Moskovitz underwent an amputation of her left leg and was confined to a wheelchair. She suffered a broken hip due to the cancer having spread to her hip bone. She was a patient at Hillcrest Hospital ten times between May 1988 and the date of her death. Moskovitz underwent extensive radiation therapy and chemotherapy, without success. The medical records, the testimony of

Moskovitz's family members and Moskovitz's videotaped deposition documented a thirteen-month period of extreme suffering and hardship for the decedent and her family. Appellant's economic damages alone were estimated at approximately $437,749.

Appellant's medical expert, Dr. Charles Bart Engleberg, an oncologist, testified at trial that whether the tumor was discovered by Figgie in October 1986 or February 1987, Figgie deviated from accepted standards of care by failing to remove the tumor prior to the end of March 1987. Engleberg testified that had the tumor been removed during the first few months of 1987, before it had exceeded approximately one centimeter by one and a half centimeters in size, Moskovitz would have fully recovered and the cancer would not have metastasized.

Dr. Michael Simon, an orthopedic surgeon, and Dr. Makley testified as medical experts for the defense. Based upon a later review of x-rays taken during Moskovitz's November 1986 hospital admission, these doctors testified that the cancer had metastasized prior to November 1986, rendering the decedent's death imminent. On rebuttal, Dr. Ralph J. Alfidi, a radiologist, stated that there were no indications in the x-rays taken in November 1986 that the cancer had metastasized by that time. According to Dr. Alfidi, dark spots on the x-rays such as those identified by Simon and Makley as evidence of the spread of cancer generally indicate loss of bone density commonly occurring in postmenopausal women.

During the trial, Makley was granted a directed verdict, as no expert medical testimony had been presented

against him. Additionally, appellant dismissed all claims against University Orthopaedic.

On December 20, 1989, the jury returned its verdict in favor of appellant and against Figgie. The jury awarded appellant $2 million on the survival claim, $1.25 million on the claim for wrongful death, $5,000 for funeral and burial expenses and $3 million in punitive damages. In response to an interrogatory concerning its finding of liability, the jury stated:

"Dr. Figgie's records indicate that he was aware of a lesion on the decedent's tendo achilles on 10/2/86. Plaintiff's Exhibits 3 and 5 indicate that, as of 11/3/86, Dr. Figgie was aware of the decedent's left tendo achilles mass and that it had been present for some time. Even with consideration of the decedent's past medical history, Dr. Figgie did not biopsy the tumor at the point of discovery. Hospital records indicate that the decedent's tumor had not metastisized [sic] by 11/3/86. We believe the decedent had a very good chance of long term survival if the tumor was found to be malignant before it exceeded one centimeter in size.

"Also, Dr. Figgie did not maintain his records as according to medical standards."

The trial court entered judgment in accordance with the jury's verdict. Figgie filed a motion for judgment notwithstanding the verdict or, alternatively, a motion for a new trial. Figgie's motion was denied, as was a motion by appellant for prejudgment interest.

Figgie appealed to the court of appeals. Appellant cross-appealed on the issue of prejudgment interest. On

January 2, 1991, during the pendency of the appeal, the trial court granted a motion by Makley for Civ.R. 11 sanctions against appellant's trial counsel, Charles Kampinski. The trial court awarded Makley $4,000 and Kampinski appealed. The appeals were thereafter consolidated.

The court of appeals upheld the finding of liability against Figgie on the wrongful death and survival claims. However, in a split decision, the court of appeals found that the award of compensatory damages was excessive and that appellant was not entitled to punitive damages as a matter of law. Therefore, by a two-to-one vote, the court of appeals reversed the judgment of the trial court as to the award of damages and remanded the cause for a new trial only on the issue of compensatory damages. Additionally, by a divided vote, the court of appeals affirmed the judgment of the trial court denying appellant's motion for prejudgment interest and affirmed the award of Civ.R. 11 sanctions against Kampinski.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Charles Kampinski Co., L.P.A., Charles Kampinski, Christopher M. Mellino and Donna Taylor-Kolis, for appellants.

Fritz Byers; Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., John V. Jackson II, Robert Seibel and Steven Hupp, for appellee.

Steven S. Zaleznik, Michael R. Schuster and Bruce B. Vignery; Patton, Boggs & Blow and Steven M. Schneebaum, urging reversal for amicus curiae, American Ass'n of Retired Persons.

Jeffrey R. White, urging reversal for amicus curiae, Ass'n of Trial Lawyers of America.

Nurenberg, Plevin, Heller & McCarthy Co., L.P.A., Andrew P. Krembs and Kathleen J. St. John, urging reversal for amicus curiae, Ohio Academy of Trial Lawyers.

DOUGLAS, Justice.

This appeal presents four issues for our consideration. Were punitive damages, and the amount awarded, appropriate and proper on the facts of this case? Were the compensatory damages awarded for the survival action and for wrongful death excessive? Should prejudgment interest have been allowed? Was it proper to sanction appellant's attorney under Civ.R. 11? Figgie has not appealed and, thus, the finding that Figgie was negligent in his care and treatment of Moskovitz is not at issue.

I

Punitive Damages

The jury's award of punitive damages was based upon Figgie's alteration, falsification or destruction of medical records. The punitive damages were awarded in connection with the survival action. The court of appeals' majority vacated the award of punitive damages for two reasons. First, the court of appeals' majority determined that punitive damages were not available under the circumstances of this case, since Figgie's act of altering and

destroying records did not directly cause actual harm to appellant – i.e., records disappeared and were altered after the diagnosis of terminal illness and the alteration and disappearance of the records did not adversely affect appellant's claims. Second, the court of appeals' majority found that appellant failed to establish a right to punitive damages under the standards set forth in *Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.* We disagree.

The court of appeals held that for punitive damages to be awarded, appellant was required to prove "a harm distinct from the medical negligence claim and attributable solely to the alleged alteration of medical records." To support this conclusion, the court of appeals relied upon *Shimola v. Nationwide Ins. Co. (1986), 25 Ohio St.3d 84, 25 OBR 136, 495 N.E.2d 391; Bishop v. Grdina (1985), 20 Ohio St.3d 26, 20 OBR 213, 485 N.E.2d 704; and Rouse v. Riverside Methodist Hosp. (1983), 9 Ohio App.3d 206, 9 OBR 355, 459 N.E.2d 593.* However, nothing in these cases suggests that the malicious intent necessary to sustain an award of punitive damages must itself proximately result in some compensable harm.

Shimola and Bishop, supra, stand for the age-old proposition that proof of actual damages in an underlying cause of action is a necessary predicate for an award of punitive damages. See, also, *Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273,* and *Richard v. Hunter (1949), 151 Ohio St. 185, 39 O.O. 24, 85 N.E.2d 109.* In Ohio, no civil action may be maintained simply for punitive damages. *Bishop, supra,* 20 Ohio St.3d at 28, 20 OBR at 214, 485 N.E.2d at 705. Rather, punitive damages are awarded as a mere incident of the

cause of action in which they are sought. *Id.* Thus, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered.

Bishop was a case involving an award of punitive damages where no compensatory damages were awarded on the underlying cause of action. In *Bishop*, we held that proof of actual damages on the underlying claim is a necessary predicate for an award of punitive damages. *Id. at 28, 20 OBR at 214, 485 N.E.2d at 705.* In so holding, we relied upon *Richard, supra,* which also involved a situation where punitive damages were found to be improper in the absence of an award of compensatory damages on an underlying claim. The court of appeals in the case at bar seized upon the statement in *Bishop* that "[p]unitive damages are awarded as punishment for *causing compensable* harm and as a deterrent against similar action in the future." (Emphasis added.) *Id.* at 28, 20 OBR at 214, 485 N.E.2d at 705. However, that statement in *Bishop* does not require the conclusion that malicious conduct giving rise to punitive damages must produce some compensable harm. Again, the matter at issue in *Bishop* was whether an award of punitive damages is legally supportable where no actual harm is shown in the underlying cause of action.

In *Shimola, supra, 25 Ohio St.3d 84, 25 OBR 136, 495 N.E.2d 391,* an insured sued his insurer for the tort of bad faith. The insured sought an award of punitive damages in connection with that claim. The jury awarded no actual damages on the claim, but awarded the insured $160,000 in punitive damages. We held that the award of punitive damages could not be sustained absent proof of actual

damages *stemming from the underlying claim for bad faith. Id. at 86, 25 OBR at 138, 495 N.E.2d at 393. Shimola* clearly does not support the conclusion reached by the court of appeals' majority.

Here, appellant was awarded compensatory damages in the survival claim for Figgie's medical malpractice and that award formed the necessary foundation for the award of punitive damages. Figgie suggests that his alteration of medical records constitutes a separate claim requiring proof of actual damages, that no actual damages were shown to flow from the alteration, and that punitive damages were therefore improper. In this regard, we have recently held that "[a] cause of action exists in tort for interference with or destruction of evidence * * * ." *Smith v. Howard Johnson Co., Inc. (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037, 1038.* However, nothing in Smith can be interpreted to say that a separate cause of action for spoliation of evidence is the only way such conduct can be addressed and remedied. We expressly reject any such notion. If appellant were constrained to bring a separate cause of action for spoliation of evidence, that claim would inevitably fail, since there is no damage flowing directly from the alteration of records. Therefore, no punitive damages could be awarded to punish the unlawful conduct. Thus, if Figgie's argument is taken to its logical conclusion, litigants and prospective litigants could alter and destroy documents with impunity so long as no actual damage was caused thereby. Of course, if the damning evidence were destroyed without trace, no liability would attach on any claim, since no evidence would remain to implicate the spoliator. In our judgment, Figgie's alteration of records was inextricably

intertwined with the claims advanced by appellant for medical malpractice, and the award of compensatory damages on the survival claim formed the necessary predicate for the award of punitive damages based upon the alteration of medical records.

The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. *See, e.g., Preston, supra, 32 Ohio St.3d at 335, 512 N.E.2d at 1176; Detling v. Chockley (1982), 70 Ohio St.2d 134, 136, 24 O.O.3d 239, 240, 436 N.E.2d 208, 209; and Calmes v. Goodyear Tire & Rubber Co. (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416, 419.* See, also, *Bishop* and *Richard, supra.* Therefore, it would make no sense for this court to establish a rule requiring that malicious conduct giving rise to a claim for punitive damages must independently cause compensable harm before punitive damages may be awarded. If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less. Figgie's conduct of altering records should not go unpunished. We should warn others to refrain from similar conduct and an award of punitive damages will do just that.

We recognize that certain language in *Rouse, supra, 9 Ohio App.3d at 208-209, 9 OBR at 358, 459 N.E.2d at 597,* lends some support to Figgie's and the court of appeals' position that later concealment or destruction of evidence

of negligence cannot render an act of negligence malicious and, thus, punitive damages are unavailable in such a case absent proof of actual harm stemming from the concealment or destruction. However, we are more persuaded by the case of *Spadafore v. Blue Shield (1985), 21 Ohio App.3d 201, 21 OBR 215, 486 N.E.2d 1201.* In *Spadafore,* Judge Moyer (now Chief Justice Moyer) concurred in the following statement of the law concerning punitive damages and the alteration of documents:

"[T]here was some additional evidence, although not substantial, of possible intentional alteration of documents. Such conduct is the type of intentional and deceptive behavior more indicative of actual malice. If such evidence is believed, the jury could award punitive damages. With the proper caution exercised in instructing the jury as to when punitive damages are proper, the issue of punitive damages should have been submitted to the jury." *Id. at 204-205, 21 OBR at 218, 486 N.E.2d at 1205.*

Moreover, in *Calmes, supra, 61 Ohio St.3d at 473, 575 N.E.2d at 419,* this court stated that "[p]unitive damages in this state *are available upon a finding of actual malice.*" (Emphasis added.) The term "actual malice" has been defined in the case of *Preston, supra, 32 Ohio St.3d 334, 512 N.E.2d 1174,* and the definition does not include an element of actual harm. In *Preston,* syllabus, we held that:

"Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and

safety of other persons that has a great probability of causing substantial harm." (Emphasis sic.)

Figgie's alteration of records exhibited a total disregard for the law and the rights of Mrs. Moskovitz and her family. Had the copy of page seven of Figgie's office chart not been recovered from the radiation department records at University Hospitals, appellant would have been substantially less likely to succeed in this case. The copy of the chart and other records produced by Figgie would have tended to exculpate Figgie for his medical negligence while placing the blame for his failures on Moskovitz. We find that the evidence adduced at trial fully supported an award of punitive damages under the standards set forth in the Preston syllabus.

The court of appeals' majority also determined that there was no evidence that Figgie altered or destroyed records to conceal his medical negligence. However, upon a thorough review of the record, we are convinced that the jury was presented with sufficient evidence which, if believed, supported the inference that records were altered, destroyed or concealed by Figgie in an effort to conceal his medical negligence. A unanimous panel of "arbitrators" determined that records were altered with bad motive, and that Figgie was the responsible party. Further, having awarded punitive damages, the jury, which heard the evidence and observed the demeanor of the witnesses, apparently, also so found. A competent and respected trial judge upheld the award of punitive damages and denied a motion for a new trial. With all due respect to the court of appeals' majority, we believe that the appellate court simply substituted its judgment for that of the jury and, thereby, invaded the province of

the finder of fact. Further, as we stated in *Myers v. Garson (1993), 66 Ohio St.3d 610, 614, 614 N.E.2d 742, 745,* "we have often noted in the past, where the decision in a case turns upon credibility of testimony, and where there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court." In our judgment, the court of appeals' majority erred in holding that, as a matter of law, appellant was not entitled to an award of punitive damages.

Accordingly, we reverse the judgment of the court of appeals on the issue of punitive damages. We hold that in a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of "actual malice" as that term is defined in the syllabus of *Preston v. Murty, supra.* An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm. However, we reiterate that the purpose of punitive damages is to punish and deter. The jury's reaction in awarding $3 million in punitive damages may be understandable, given its findings of Figgie's activities, but it is wrong. Punishment does not mean confiscation. Figgie's net worth (depending on who is believed) is somewhere between $2.1 million and $3 million. We find that a portion of that net worth will send the message.

In determining the appropriate amount of punitive damages to be awarded, we are guided by the perspicuous observations of Judge John W. McCormac in *Shoemaker v. Crawford (1991), 78 Ohio App.3d 53, 603 N.E.2d 1114.* In ordering a remittitur in Shoemaker for an award of compensatory damages found to be excessive, Judge McCormac stated:

"Determining the amount of damages which is the maximum for adequate compensation is not an easy task. No simple mathematical formula can be applied as to either a minimum or a maximum, and there is a wide range between those figures. The decision rests as much on policy considerations as it does anything else and some degree of arbitrariness cannot be totally divorced from the decision, whether made by us or by the jury." *Id. at 66, 603 N.E.2d at 1121-1122.*

Much the same can be said in the case at bar with regard to a determination of the appropriate amount of punitive damages. Upon a review of the record, we find that $1 million in punitive damages is the appropriate amount to be awarded. Therefore, with respect to the jury's verdict for $3 million in punitive damages, we order a remittitur of $2 million.[6] Upon remand, appellant

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[6] Since *Shaffer v. Maier (1994), 68 Ohio St.3d 416, 627 N.E.2d 986,* questions have arisen concerning the authority of an appellate court to order a remittitur. Where a verdict is found to be excessive but not the result of passion or prejudice, an appellate court may order a remittitur with the consent of the prevailing party. In *Chester Park Co. v. Schulte (1929), 120 Ohio St. 273, 166 N.E. 186,* paragraphs five and six of the syllabus, this court held that:

may elect to accept the remittitur, in which case the trial court shall enter judgment in appellant's favor for $1 million in punitive damages. Conversely, appellant may elect to refuse the remittitur, in which case a new trial should be conducted only on the issue of punitive damages. A jury,[7] if one is impanelled for this purpose, shall be instructed that punitive damages in some amount

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"5. The Court of Appeals has the same unlimited power and control of verdicts and judgments as the trial court and may weigh the evidence and exercise an independent judgment upon questions of excessive damages and when no passion or prejudice is apparent may modify and affirm the judgment by ordering a remittitur with the consent of the prevailing party.

"6. If the Court of Appeals in an error proceeding in an action for unliquidated damages finds that the verdict was rendered under the influence of passion or prejudice it has no alternative except to reverse and remand for a new trial." (Emphasis sic.)

In *Duracote Corp. v. Goodyear Tire & Rubber Co. (1983), 2 Ohio St.3d 160, 162-163, 2 OBR 704, 706, 443 N.E.2d 184, 186,* we reaffirmed the principles set forth in the fifth paragraph of the syllabus of Schulte. See, also, *Shoemaker, supra, 78 Ohio App.3d 53, 603 N.E.2d 1114.*

Civ.R. 59(A) sets forth the grounds upon which a new trial may be granted. One ground for the granting of a new trial is that the damages awarded are inadequate or excessive, appearing to have been given under the influence of passion or prejudice. Civ.R. 59(A)(4). Thus, if an award is excessive and appears to be the product of passion or prejudice, a new trial is proper and should be ordered by a reviewing court. However, where the award is found to be excessive but not the product of passion or prejudice, a remittitur may be ordered by the appellate court with the consent of the prevailing party. See Schulte, Duracote and Shoemaker, supra.

[7] We make no determination as to the applicability or constitutionality of R.C. 2315.18 and 2315.21(C)(2).

must be awarded and that the jury's determination is to be based upon the evidence presented to them which, we fully recognize, might require a re-presentation of much of the underlying case.

II

Compensatory Damages

The court of appeals' majority found that the award of compensatory damages for the survival action and wrongful death was excessive and that the jury's award was influenced by passion and prejudice. Accordingly, the court of appeals' majority vacated the award and remanded for a new trial only on the issue of compensatory damages. We find that the court of appeals erred in this regard.

A. Survival Action Award

With respect to the jury's award on the survival claim, the court of appeals' majority found that the award of $2 million was so high that it amounted to a denial of substantial justice, and that the award "was impermissibly influenced by the jury's erroneous consideration of punitive damages." In addition to finding that the jury's consideration of punitive damages was appropriate and proper, we also believe that the jury's consideration of punitive damages cannot form the basis for vacating the award of compensatory damages.

In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the

jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive. See *Toledo, Columbus & Ohio River RR. Co. v. Miller (1923), 108 Ohio St. 388, 402-403, 140 N.E. 617, 621.* In the case at bar, we make no such finding as to the compensatory damages awarded by the jury. The jury's $2 million award on the survival claim is not so manifestly excessive that a conclusion must be drawn therefrom that the award was the product of passion and prejudice. The bulk of the award was obviously for the pain and suffering Moskovitz experienced in the final year of her life, and the jury was undoubtedly in the best position to make the assessment of damages. The record is devoid of any evidence that the jury was wrongfully influenced in returning a large award, and the amount of the award itself is not so manifestly excessive at [sic] to have warranted the court of appeals' interference with the province of the jury. In addition, the trial judge was in the best position to determine whether the award on the survival claim was manifestly excessive or influenced by passion and prejudice. See, generally, *Villella v. Waikem Motors, Inc. (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464, 469, and Larrissey v. Norwalk Truck Lines, Inc. (1951), 155 Ohio St. 207, 219, 44 O.O. 238, 243, 98 N.E.2d 419, 426.* The trial judge refused to set the verdict aside and denied the motion for a new trial. That determination is entitled to deference.

B. Wrongful Death Award

As to the jury's $1.25 million award for wrongful death, the court of appeals' majority held that the award was manifestly excessive in light of the economic damages

proven and in light of Moskovitz's frail condition prior to the onset of her terminal illness. Again, the determination of damages was a question for the jury and the court of appeals was not at liberty to substitute its judgment for that of the finder of fact. The jury heard evidence concerning a variety of damages suffered by the wrongful-death beneficiaries. Although the jury's award was large, it cannot be said with any degree of certainty that the award was excessive. While Moskovitz may have been frail prior to the onset of her illness, the dissent in the court of appeals ably noted that Moskovitz "was neither an amputee, dead, nor dying when Dr. Figgie failed to adequately diagnose and then treat the cancer." Moskovitz's family unquestionably suffered the loss of a loving wife and mother, and the jury was in a far better position than the court of appeals to determine the value of the losses suffered.

The court of appeals' majority also suggested that the jury's award for wrongful death may have been improperly influenced by certain references at trial to Moskovitz's concentration camp experience and her survival of the Holocaust. However, we note that both appellant and Figgie commented and presented evidence on this matter. Moreover, upon a careful review of the entire record, we do not find that the jury's award was affected by passion and prejudice.

Based upon the foregoing, we find that the court of appeals erred in vacating the award of compensatory damages on the claims for survival and wrongful death. Therefore, on those issues, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

III

Prejudgment Interest

The issue of prejudgment interest has become a complex question. This case is a perfect example of the problem. Accordingly, the matter of prejudgment interest generally, and in this specific case, needs some discussion.

A. Prejudgment Interest at Common Law

Since the 1800s, Ohio courts have recognized a common-law right to prejudgment interest. In *Hogg v. Zanesville Canal & Mfg. Co. (1832), 5 Ohio 410, 424,* this court said, "But interest is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain made from its use by the debtor." In the last paragraph of the syllabus of Hogg, this court said, "In actions for torts the jury may calculate interest on the damages actually sustained and add it to their verdict."

In *Lawrence RR. Co. v. Cobb (1878), 35 Ohio St. 94,* paragraph four of the syllabus, this court said, "In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included." Further, in *Cobb,* at 98-99, the court stated that "[t]he rule of damages in such case is compensation for the injury, or, in other words, that the injured party should be made whole. And while it is true that such a claim is not one, which, under the statute, bears interest, nevertheless, if reparation for the injury is delayed for a long time by the wrong-doer, the injured party can not be made whole unless the damages awarded include compensation, in

the nature of interest, for withholding the reparation which ought to have been promptly made."

In *Clevenger v. Westfield Co. (1978), 60 Ohio App.2d 1, 14 O.O.3d 3, 395 N.E.2d 377,* paragraph two of the syllabus, the court said that "[t]he jury may assess prejudgment interest in favor of the insured under an automobile collision insurance policy where the insurer does not make a reasonable offer of settlement on or before the date the loss is due and payable." While, admittedly, that court was dealing with a predecessor version of R.C. 1343.03, it also discussed possible recovery of interest under common-law principles. The allowance of prejudgment interest by the *Hogg* and *Cobb* courts without a specific statutory provision and the discussion of the common-law right to interest by the *Clevenger* court confirm that prejudgment interest was known at common law.

Having established that prejudgment interest was known at common law in Ohio, we now move to correct our statement in *Bell v. Mt. Sinai Med. Ctr. (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181, 183,* that "[a]ppellants correctly observe that an action for prejudgment interest pursuant to R.C. 1343.03(C) constitutes a special proceeding inasmuch as the right to obtain such relief is purely statutory in nature and was unavailable at common law." This statement was incorrect and the cases cited as authority for the proposition do not support it. Prejudgment interest was known at common law and, consequently, an action seeking prejudgment interest does not constitute a special proceeding. See *Polikoff v. Adam (1993), 67 Ohio St.3d 100, 616 N.E.2d 213,* syllabus, where

we said that "[o]rders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02." See, also, *Dayton Women's Health Ctr. v. Enix (1990), 52 Ohio St.3d 67, 74, 555 N.E.2d 956, 962* (Douglas, J., dissenting). Accordingly, we modify Bell to correct our previous error.

B. The Statute – R.C. 1343.03(C) – Purpose

In 1982, Representative (now Judge, Tenth District Court of Appeals) Dana Deshler, Jr., introduced and sponsored Am.Sub.H.B. No. 189, 139 Ohio Laws, Part I, 2034. Eventually passed by the General Assembly and signed into law by the Governor, the bill enacted R.C. 1343.03(C), which permits an injured party, in certain circumstances, to recover interest in a tort action from the date the cause of action accrues. Thus, Ohio has created a statutory right to prejudgment interest.

R.C. 1343.03(C) reads:

"Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

In *Peyko v. Frederick (1986), 25 Ohio St.3d 164, 167, 25 OBR 207, 209, 495 N.E.2d 918, 921,* we said that "[t]he purpose of R.C. 1343.03(C) is to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy." In *Kalain v. Smith (1986), 25 Ohio St.3d 157, 159, 25 OBR 201, 202, 495 N.E.2d 572, 574,* this court said that "[t]he statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting."

Thus, the purpose of the statute is clear. What are the components of the statute?

C. Components of the Statute

The statute sets forth certain requirements. First, a party seeking interest must petition the court. The decision is one for the court – not any longer a jury. The motion must be filed after judgment and in no event later than fourteen days after entry of judgment. *Cotterman v. Cleveland Elec. Illum. Co. (1987), 34 Ohio St.3d 48, 517 N.E.2d 536,* paragraph one of the syllabus. Second, the trial court must hold a hearing on the motion. Third, to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, fourth, the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. R.C. 1343.03(C).

The statute uses the word "shall." Therefore, if a party meets the four requirements of the statute, the decision to allow or not allow prejudgment interest is not discretionary. What is discretionary with the trial court is the determination of lack of good faith. Since the crux of the statute is "good faith effort" and the ultimate decision whether to award prejudgment interest is reposed in the trial judge and, further, since the standard of review on appeal is abuse of discretion, *Ziegler v. Wendel Poultry Serv., Inc. (1993), 67 Ohio St.3d 10, 20, 615 N.E.2d 1022, 1032,* the obvious question becomes what is a "good faith effort" or, conversely, when has a party "failed to make a good faith effort to settle"?

D. Good Faith Effort

R.C. 1343.03(C) clearly requires the development of a judicial standard of good faith. In this court's recent case on the question, *Kalain, supra, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572,* at the syllabus, we said that:

"A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

While the last sentence in this syllabus has caused some difficulty we, nevertheless, reaffirm our holding

with the caveat that the last sentence of the syllabus should be strictly construed so as to carry out the purposes of R.C. 1343.03(C).

The effect of *Kalain* is to place the burden of proof on a party seeking prejudgment interest. This is, to a degree, unfortunate since much of the information needed to make a case for prejudgment interest is in the possession of the party resisting an award. Accordingly, it is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors would include responses – or lack thereof – and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should also be considered by a trial court in making a prejudgment interest determination.

Even though the burden of a party seeking an award is heavy, the burden does not include the requirement that bad faith of the other party be shown. Lack of a good faith effort to settle should not be confused with bad faith. As we noted in *Kalain, supra, 25 Ohio St.3d at 159, 25 OBR at 202-203, 495 N.E.2d at 574,* a party may have failed to make a good faith effort to settle even though he or she did not act in bad faith. In this regard, we now move to correct a statement we made in *Villella, supra.* Therein, we stated that "a lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud." *Id., 45 Ohio St.3d at 42, 543 N.E.2d at 470.* We now

find that statement, as it relates to the lack of a good faith effort to settle, does not represent the state of the law as set forth in *Kalain*. Therefore, we now specifically modify the law stated in *Villella* by disapproving the above-quoted language. We hold that in prejudgment interest determinations pursuant to R.C. 1343.03(C), the phrase "failed to make a good faith effort to settle" does not mean the same as "bad faith."

In making this so-called good faith determination, a trial court is faced with a number of difficult issues. Two of those issues involve discovery and privilege. After a ruling on discovery has been made by the trial court, the question then arises as to the appealability of that determination.

E. Discovery – Privilege – Appealability

Our review of the extensive transcript of the prejudgment interest hearing conducted in this case sheds some light on the difficulties facing the bench and bar. Without question, one of the most difficult problems concerns the scope of discovery available in a proceeding for prejudgment interest.

In *Peyko, supra, 25 Ohio St.3d 164, 25 OBR 207, 495 N.E.2d 918*, paragraphs one and two of the syllabus, this court held that:

"1. When a plaintiff, having obtained a judgment against a defendant, files a motion for prejudgment interest on the amount of that judgment pursuant to R.C. 1343.03(C), the plaintiff, upon a showing of 'good cause' pursuant to Civ.R. 26(B)(3), may have access through

discovery to those portions of the defendant's insurer's 'claims file' that are not shown by the defense to be privileged attorney-client communications.

"2. If the defense asserts the attorney-client privilege with regard to the contents of the 'claims file,' the trial court shall determine by in camera inspection which portions of the file, if any, are so privileged. The plaintiff then shall be granted access to the non-privileged portions of the file."

Peyko establishes that any determination regarding a party's good faith effort to settle requires a review of the settlement efforts made by a party's insurance carrier(s). *Id. at 166-167, 25 OBR at 209, 495 N.E.2d at 921.* Most of the information regarding the insurer's efforts will be contained in the claims file. In this regard, *Peyko* clearly recognizes that a post-trial proceeding for prejudgment interest is amenable to the general discovery process established by the Civil Rules. Indeed, in *Cotterman, supra, 34 Ohio St.3d 48, 517 N.E.2d 536,* paragraphs two and three of the syllabus, this court held that:

"2. The R.C. 1343.03(C) proceeding is amenable to the discovery process. The trial court should exercise such governance so as to speedily resolve the post-trial discovery.

"3. The Rules of Civil Procedure, as utilized in the general discovery process, are applicable to R.C. 1343.03(C) proceedings."

However, *Peyko* provides little guidance on the ultimate question: What is a privileged communication between an attorney and a client? We must look to the

purposes of R.C. 1343.03(C), 2317.02 and Civ.R. 26 to provide the answer.

The attorney-client privilege has ancient roots. The history of the privilege can be traced back at least as far as the reign of Elizabeth I, where the privilege was already well established. See 8 Wigmore, Evidence (McNaughton Rev.1961), Section 2290. See, also, *Spitzer v. Stillings (1924), 109 Ohio St. 297, 142 N.E. 365.* In the modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential. Only in this manner can there be freedom from apprehension in the client's consultation with his or her legal advisor. Wigmore, *supra,* at Section 2291. However, the privilege is not absolute. That is to say, the mere relation of attorney and client does not raise a presumption of confidentiality of all communications made between them. *Id.* at Section 2311. Moreover, it is beyond contradiction that the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction. Advice sought and rendered in this regard is not worthy of protection, and the principles upon which the attorney-client privilege is founded do not dictate otherwise. See Wigmore, *supra,* at Section 2298. See, also, *Lemley v. Kaiser (1983), 6 Ohio St.3d 258, 6 OBR 324, 452 N.E.2d 1304,* wherein Judge (now Justice) Alice Robie Resnick, writing for this court, found that the attorney-client privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires.

With these principles in mind, it is clear that statements, memoranda, documents, etc. generated in an

attorney-client relationship tending to establish the failure of a party or an insurer to make a good faith effort to settle a case contrary to the purposes of R.C. 1343.03(C) are not protected from discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. Stated otherwise, if, through the lack of a good faith effort to settle, the purposes of R.C. 1343.03(C) have been thwarted by a party and/or the attorneys involved in the case, a search for the truth of that fact cannot be hindered by claims of attorney-client privilege. Documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege.

As we have stated, the purpose of R.C. 1343.03(C) is to encourage good faith efforts to settle a case outside the trial setting. The focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the *pretrial* settlement efforts made between the plaintiffs and defendants and/or their insurers. Often, the only way for a party to prove another party's failure to make a good faith effort to settle is by obtaining the claims file of an insurer. However, the attempt to do so is often met by defense objections to the discoverability of matters contained within the file on the basis of work product or attorney-client privilege. If access to the file or matters contained therein is denied on the basis of privilege, the hearing required under R.C. 1343.03(C) may amount to nothing less than a retrial of the entire case. The case at bar is an example of this recurrent phenomenon, although the insurer's claims file in this case was not

necessary to show that Figgie and/or those acting on his behalf failed to make a good faith effort to settle the case.

The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding. Civ.R. 26(B)(1). As indicated, in some cases, nothing is more relevant in an R.C. 1343.03(C) proceeding than the claims file of an insurer. The file may contain memoranda or other relevant matters which establish the lack of a good faith effort to settle. At the same time, the matters contained within the file may be privileged work product or attorney-client communications, beyond the scope of discovery.

The time has come for this court to define what is and is not a privileged communication[8] in an insurer's

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[8] R.C. 2317.02(A) sets forth a testimonial privilege respecting communications made between an attorney and a client. R.C. 2317.02 provides, in pertinent part:

"The following persons shall not testify in certain respects:

"(A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client * * *.

"(B)(1) A physician or a dentist, concerning a communication made to him by his patient in that relation or his advice to his patient * * *."

Although R.C. 2317.02 grants a privilege respecting attorney-client communications, the statute does not define what is meant by the term "communication" in that context. R.C. 2317.02(B)(3) does define "communication" in the context of the physician/dentist and patient relationship to mean "acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient." (Emphasis added.) Thus, R.C. 2317.02 provides only minimal guidance on the question concerning privileged

claims file for purposes of discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. In our judgment, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery. To hold otherwise would be to undermine the entire purpose of a hearing on the issue of prejudgment interest, i.e., to ascertain the truth regarding good faith efforts to settle. Civ.R. 26(B)(3) provides, in part, that "a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor." In a prejudgment interest proceeding, the good-cause requirement of Civ.R. 26(B)(3) is that which is appropriate to effectuate the General Assembly's purposes of enacting R.C. 1343.03(C) – to encourage and bring about settlements.

In our continuing efforts to provide guidance to the bench and bar on difficult and pressing issues, we hold that in an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an

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attorney-client communications that may be contained in an insurer's claims file. However, given the definition of "communication" in R.C. 2317.02(B)(3) concerning a physician or dentist, it could be argued that, by analogy, a "privileged communication" between an attorney and a client found in an insurer's claims file should be limited to those matters going directly to the theory of defense of the underlying lawsuit.

insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered. Additionally, on occasion, this rule might also apply to the file of a party's attorney.

Having identified the character of discoverable items in an R.C. 1343.03(C) proceeding for prejudgment interest, we reiterate our holding in *Peyko, supra, 25 Ohio St.3d 164, 25 OBR 207, 495 N.E.2d 918,* paragraph two of the syllabus, that where the defense asserts a claim of privilege with regard to items contained in an insurer's claims file, the trial court shall conduct an in camera inspection to determine which items are privileged. Having so stated, we now move to the question of the appealability of a trial court's order compelling or denying discovery in an R.C. 1343.03(C) proceeding.

Following the ruling in *Peyko, supra,* this court then decided *Bell, supra, 67 Ohio St.3d 60, 616 N.E.2d 181.* In *Bell,* we held that the order of a trial court directing a witness opposing a request for discovery in an R.C. 1343.03(C) prejudgment interest hearing to submit materials to an in camera inspection is not a final appealable order. This court in *Bell* also, however, indicated that an order in an R.C. 1343.03(C) proceeding permitting discovery after submission of alleged privileged materials for an in camera inspection is an order affecting a substantial right made in a special proceeding. *Id. at 64, 616 N.E.2d at 184-185.* Thus, according to *Bell,* such an order is a final

order subject to immediate appeal.[9] We now find this statement in *Bell* to be incorrect. The statement was based upon the assumption that prejudgment interest was not known at common law and thus a prejudgment interest proceeding was a special proceeding. As pointed out above, prejudgment interest was known at common law and, thus, any order made in a prejudgment interest proceeding is not one made in a special proceeding.

Accordingly, we further modify *Bell* to correct our error. In doing so, we hold that an order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of "final order" set forth in R.C. 2505.02. Such an order does not determine the action or prevent a judgment, nor is it rendered in a special proceeding. Thus, an appeal from such an order must await final judgment in the prejudgment interest proceeding.

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[9] R.C. 2505.02 reads:

"An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

"When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside."

F. R.C. 1343.03(C) Applied to this Case

The court of appeals' majority, citing *Kalain, supra, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572,* affirmed the judgment of the trial court denying appellant's motion for prejudgment interest. Specifically, the court of appeals' majority found that Figgie was not obligated to make a monetary settlement offer because Figgie possessed a good faith, objectively reasonable belief that he was not liable to appellant. We find that determination to be untenable on the facts of this case.

Figgie never made any offer to settle. If Figgie ever had a good faith, objectively reasonable belief that he had no liability, the fact that the "arbitration" panel unanimously found against Figgie should have apprised him that a finding of liability at trial was possible, if not probable. Given the substantial amount of conflicting evidence in this case, the fact that medical records disappeared and were altered and the unanimous determination of the panel of "arbitrators," the inescapable conclusion is that Figgie failed to rationally evaluate his potential liability. Appellant made monetary settlement offers within the limits of Figgie's malpractice insurance coverage. One such offer was for approximately $4.3 million – the value placed upon this case by the "arbitration" panel, which did not consider the issue of punitive damages. Figgie refused to engage in any settlement negotiations.

We find that, as a matter of law, prejudgment interest should have been awarded on the facts of this case. The trial court's failure to award prejudgment interest was an

abuse of discretion.[10] We further find that the accrual date of Moskovitz's survival cause of action was January 1, 1988,[11] and prejudgment interest at the statutory rate is to be computed from and including that date up to and including the date the judgment is paid. As to the wrongful death portion of the judgment, interest is to be calculated from and including the date of death, December 5, 1988, up to and including the date the judgment is paid. The amount of interest is to be computed by the trial court upon remand.

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[10] The prejudgment interest proceeding concluded after a hearing over two days and produced a transcript of three hundred thirty-eight pages. The trial court, without explanation, denied prejudgment interest.

[11] For purposes of determining the accrual date of the survival action, several events that occurred between November 1987 and the end of January 1988 are significant. These events include the removal of the tumor and the diagnosis of malignancy on November 10, 1987, the identification of the type of tumor on November 13, 1987, Moskovitz's apparent knowledge on November 11, 1987 that the tumor was malignant, and Figgie's receipt of the medical records in December 1987 and the disappearance of those records possibly in January 1988 (see Frysinger v. Leech [1987], 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus). Although it is difficult to determine the precise accrual date of the survival cause of action given the state of the record before us, we find that January 1, 1988 is the appropriate date of accrual to be used in the calculation of prejudgment interest.

IV

Sanctions

The final issue presented for our consideration is whether it was proper for the trial court to have sanctioned appellant's attorney, Charles Kampinski, under Civ.R. 11. Sanctions were awarded in favor of Dr. Makley in the amount of $4,000. This award was based upon the fact that Kampinski did not present expert testimony against Makley at trial to establish that Makley's treatment of Moskovitz deviated from accepted standards of care. The trial court concluded that Kampinski did not have good and reasonable grounds to pursue the action against Makley, particularly after the "arbitration" panel found in favor of Makley on the issue of liability. The trial judge who decided this issue was not the same judge who had presided over the case at trial.

As a preliminary matter, we note that Kampinski, in his individual capacity, did not file a notice of appeal from the judgment of the court of appeals affirming the $4,000 award in favor of Makley. That is, Kampinski currently represents the appellant in this case, and he properly filed a notice of appeal *for appellant*, without indicating that he himself was appealing from the sanctions imposed upon him personally. To complicate matters, the attorneys who represented both Makley and Figgie do not claim to represent Makley before this court. However, as attorneys for *Dr. Figgie*, they have briefed the issue of sanctions and seek to uphold the award that was granted in *Makley's favor*. The conclusion we draw is that the issue of sanctions, which affects Kampinski individually, has become an integral part of all other matters

at issue in this case. We find that the notice of appeal filed by Kampinski on behalf of his client was sufficient to encompass the issue of sanctions and that Kampinski may properly be considered an appellant in his individual capacity.

Turning our attention to the merits of the issue, we believe that Kampinski should not have been sanctioned for pursuing the action against Dr. Makley for medical malpractice. The thrust of the allegations against Makley in the final amended complaint was that he unnecessarily amputated Moskovitz's leg and informed her that the amputation was to cure the cancer, rather than to ease her pain. However, in the absence of competent expert medical testimony against Dr. Makley, a prima facie case of medical malpractice could not be maintained.

In his deposition, Dr. Engleberg, plaintiff's medical expert, testified as follows:

"Q Are you going to state at the trial of this matter [that] * * * Dr. Makley in his care and treatment of Mrs. Moskovitz deviated from the accepted standards of medical care?

"A I will state that if, in fact, the patient was told that the procedure [amputation] was done in order to cure her or if, in fact, the patient was not shown to have had a lot of suffering and pain in that leg, then I would say Dr. Makley deviated from the standard of care.

"Q Okay. I want to be very clear that if she – are you talking about informed consent * * * [?]

"A No, no. Not necessarily written informed consent. If the patient understood that there was no chance of cure by having her leg amputated and wanted it done anyway because she had severe intractable pain and that can be demonstrated, then I would not say his care deviated from the standard of care.

"If, on the other hand, it cannot be demonstrated that she was having severe and intractable pain in that leg and the patient did not fully understand that the procedure was not of a curative intent, then I will say he deviated from the standard of care.

"I think the jury should be able to determine which of those sets of facts, which of those scenarios would most closely reflect reality."

Engleberg further testified in his deposition that he had found no evidence of informed consent or of intractable pain.

Engleberg's deposition testimony established a reasonable basis for Kampinski to fashion a complaint against Makley for medical malpractice. The deposition testimony of Aaron Moskovitz indicated that Mrs. Moskovitz was told that the amputation was for curative rather than palliative purposes. Thus, the factual predicate for the expert medical testimony that Makley had deviated from accepted standards of care was established by Kampinski prior to trial. In addition, even though the "arbitration" panel found in favor of Makley on the issue of liability, the panel noted that there was some question as to whether Moskovitz had been properly informed of the purpose of the amputation. Moreover, given the convoluted machinations of this case, where records were

altered, lost and/or not appropriately maintained and where relevant portions of Makley's teaching file had come up missing, it might very well have been legal malpractice for Kampinski not to have Makley available as a defendant at trial.

Kampinski chose not to present the evidence against Makley at trial. Why that is, we will never know. However, the purpose of Civ.R. 11 is to prohibit the filing of groundless complaints and the evidence establishes that the allegations asserted against Makley were asserted in good faith. Accordingly, we reverse the judgment of the court of appeals on this issue and vacate the $4,000 award in favor of Makley.

V

Conclusion

For the foregoing reasons, the judgment of the court of appeals is reversed and the award of compensatory damages is reinstated. Appellant is entitled to prejudgment interest and we remand this cause to the trial court to calculate the amount of prejudgment interest due and to enter judgment accordingly. The award of punitive damages is reinstated, but we order a remittitur of $2 million on the punitive damage award. On remand, appellant may accept the remittitur and a judgment of $1 million in punitive damages, or appellant may refuse the remittitur, in which case a new trial should be conducted only on the issue of punitive damages. The award of sanctions is vacated.

Judgment reversed and cause remanded.

RESNICK, FRANCIS E. SWEENEY, Sr. and PFEIFER, JJ., concur.

MOYER, C.J., and A. WILLIAM SWEENEY and WRIGHT, JJ., dissent.

WRIGHT, Justice, dissenting.

I must respectfully dissent, as I would affirm in large measure the decision of the court of appeals.

I

In Part I of the majority's opinion there is found a scholarly discussion of the criteria for punitive damages and an excellent discourse on the concept underlying the tort of spoliation of evidence. I agree that any professional, whether doctor, lawyer, or accountant, found to have committed spoliation with the intent to defraud or otherwise injure a patient or client may be subject to a claim for compensatory or nominal damages coupled with a claim for punitive damages. Further, I see no problem combining a traditional malpractice suit with a cause of action alleging spoliation of evidence. However, I do not agree with the majority's decision to permit punitive damages in a *negligence* action, because the subsequent spoliation of records does not make the original act of negligence malicious.

My major concern with the majority's opinion is its treatment of the facts surrounding the *alleged* spoliation. I agree with the suggestion in the majority's opinion that if "records were altered, destroyed or concealed by Dr. Figgie in an effort to conceal his medical negligence," an award of punitive damages may be justified in a separate

cause of action. However, the question whether Dr. Figgie "altered certain records to conceal the fact that malpractice occurred" was a hotly disputed issue at trial, an issue vigorously rebutted with lengthy testimony by Dr. Figgie and his nurse. As is true with the determination of any significant fact, it was the province of the jury to make a finding and return a verdict on the issue of the alleged spoliation of evidence. Such a determination is *not* our task. What the majority overlooked, presumably, is that the trial judge did not include in his charge to the jury one single word concerning this hotly disputed issue of spoliation. Indeed, the entire jury charge dealt strictly with medical malpractice. The plaintiff neither pleaded a cause of action for spoliation nor asked for instructions on spoliation.

I also do not agree with the majority that "[i]f appellant were constrained to bring a separate cause of action for spoliation of evidence, that claim would inevitably fail since there is no damage flowing directly from the alteration of records." Some measure of damages will flow inevitably from the alteration of records when the alteration is done to avoid liability for the physician's medical negligence. At the very least, the plaintiff may have to expend additional time and effort to reconstruct the original records. Since the purpose of the spoliation is to avoid liability, the plaintiff's ability to succeed in the negligence action may be made more difficult because of the spoliated records. This harm can be seen in the present case. Dr. Figgie relied on his version of the records to claim that he was not negligent because he had advised appellant to have a biopsy but she refused his advice. The inclusion of this statement in his records may have made

appellant's claim more difficult to prove. When a physician commits spoliation of evidence to avoid liability for his or her medical negligence, the patient is automatically entitled to at least nominal damages. In some cases, for example where the spoliation impairs the future course of treatment of the patient, more than nominal damages may also result.[12]

Therefore, I would hold that a party must plead a separate cause of action for the tort of spoliation of evidence. The jury should be instructed that if it finds the defendant altered or destroyed records with the purpose of avoiding liability for his or her negligence, the jury must award at least nominal damages. The jury may then proceed to the question of punitive damages. In such a situation, the test of *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, can be met as the jury can properly find that actual malice occurred due to the defendant's "conscious disregard for the rights and safety of other

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[12] To presume damages arise from the intentional tort of spoliation of evidence is consistent with the long-standing presumption for other intentional torts such as assault, battery and defamation. "[E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury." *Ashby v. White* (King's Bench 1703), 2 Ld.Raym. 938, 955 (Holt, C.J., dissenting). Holt's position prevailed, as the majority was reversed by the House of Lords (1703), *id.* at 958.

persons that has a great probability of causing substantial harm." The great probability of substantial harm to the plaintiff is that an otherwise meritorious action for negligence will be defeated due to the tortious conduct of the defendant.

Suffice it to say, contrary to the conclusion reached by the majority following its review of the record, the jury *did not* make a finding that Dr. Figgie was involved in spoliation.[13] Without such a finding and verdict, which would be tantamount to a finding of malicious intent or reckless disregard, there exists no basis for punitive damages. Thus, the court of appeals correctly found that punitive damages were inappropriate in this case, as this was a cause premised on negligence.

In addition to the foregoing, I note that the trial judge was well aware that the jury's total award of $3 million in punitive damages at best equalled and probably far exceeded Dr. Figgie's net worth. I believe the punitive damage award in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366; *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1; *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* (1989), 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219.

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[13] In its first paragraph, the majority asserts that Dr. Figgie "altered certain records to conceal the fact that malpractice had occurred," as if the jury made a specific finding on this issue.

II

The jury award of punitive damages having been determined to be without basis, it is perfectly clear that, as stated by the court of appeals, the compensatory damage award was excessive and the product of passion and prejudice. I am convinced that, as the court of appeals pointed out, "the jury's survivorship award [of $2 million] was impermissibly influenced by the jury's erroneous consideration of punitive damages." I also agree fully with the court of appeals that the jury's wrongful death award of $1.25 million was "manifestly excessive."

This court consistently has ruled that where an excessive verdict is the product of passion and prejudice, a new trial must be granted. *Larrissey v. Norwalk Truck Lines* (1951), 155 Ohio St. 207, 44 O.O. 238, 98 N.E.2d 419, paragraph four of the syllabus. We have emphasized, for example, that "[i]n a trial of a negligence action * * * deliberate and persistent appeals to the sympathy of the jury, either directly or indirectly, are improper, as tending to induce either excessive or inadequate verdicts as a result of such appeal to the passion or prejudice of the jury." *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 43 O.O. 334, 96 N.E.2d 289, paragraph one of the syllabus. Thus, "where the damages awarded are excessive and appear to have been given under the influence of passion or prejudice, *the resulting prejudice cannot be corrected by remittitur*; the only recourse is the granting of a new trial." (Emphasis added.) *Id.* at paragraph two of the syllabus. See, also, *Guccione v. Hustler Magazine, Inc.* (Oct. 8, 1981), Franklin App. No. 80AP-375, unreported, at 33, 1981 WL 3516.

Even a cursory review of the record reveals that counsel for Moskovitz leveled "deliberate and persistent appeals to the sympathy of the jury," referring repeatedly, for instance, to Mrs. Moskovitz's confinement in a Nazi concentration camp during the Second World War. The record also indicates that plaintiff's counsel made the spoliation claim, not the malpractice claim, the primary focus of the trial. Moskovitz's counsel devoted most of his cross-examination of Dr. Figgie, ninety pages of testimony, to the alteration of Moskovitz's medical records. In opening statements and again in closing arguments, counsel for Moskovitz emphasized and reemphasized the issue of spoliation, alluding many times to Dr. Figgie's cover-up and the "smoking gun." Throughout the trial, counsel for Moskovitz repeatedly attempted to direct the jury's attention to the allegation that Dr. Figgie had tried to conceal his negligent treatment of Moskovitz by subsequently altering the medical records. But despite this pattern of conduct, as previously stated, the trial court never instructed the jury on the matter of spoliation or gave a limiting instruction thereon. Not even a suggestion of the spoliation issue exists in the trial court's charge to the jury.

In light of the foregoing, I believe the court of appeals correctly found that the jury was wrongfully influenced and that both the compensatory damage award and the award of punitive damages were excessive and the result of passion and prejudice. Therefore, I feel the court of appeals properly remanded the case to the trial court for a new trial on the issue of compensatory damages.

III

I must also address the majority's position on prejudgment interest and the majority's treatment of *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 616 N.E.2d 181.

The majority begins its discussion of this issue by declaring that a common-law right to prejudgment interest existed in Ohio and, therefore, contrary to a recent decision of this court, a prejudgment interest proceeding is not considered a "special proceeding" for purposes of R.C. 2505.02. Thus the majority concludes, in paragraph four of the syllabus, that "[a]n order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of 'final order' set forth in R.C. 2505.02."

This statement by the majority attempts to modify a decision issued by this court just last term. In *Bell* we were faced squarely with the question of whether an order for discovery in a prejudgment interest hearing was a final appealable order.

The issue we addressed in *Bell*, however, is *not* an issue before this court today. Rather, the question we must answer today is whether the award of prejudgment interest was appropriate in this case. We have not been asked to consider the appealability of an order issued during a prejudgment interest hearing. Hence, the lengthy discussion engaged in by this court concerning the appealability of an order issued during a prejudgment interest hearing is nothing more than dicta. Given the recent issuance of the *Bell* decision, the present case is not the proper forum for such a discussion. Members of

this court had ample opportunity to express any reservations concerning that issue during our consideration of *Bell*, which was decided by six members of this court with the seventh member concurring in judgment only. At a minimum, because it does not address an issue before this court, the dicta should be removed from the syllabus.

I also take issue with the majority's decision of the *relevant* prejudgment interest question.

It is well-settled law that the decision to award prejudgment interest lies within the sound discretion of the trial court. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 19 OBR 123, 482 N.E.2d 1248. That decision will not be reversed by a court of appeals unless the record reflects an abuse of discretion by the trial court. *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572. The phrase "abuse of discretion" is a term of art defined long ago to mean "more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner v. Custer* (1940), 137 Ohio St. 448, 19 O.O. 148, 31 N.E.2d 855, paragraph two of the syllabus. Clearly then, the decision of the trial court in this case should remain undisturbed unless that decision was tainted by an unreasonable, arbitrary, or unconscionable attitude.

In my judgment there is no evidence of any abuse of discretion here. The trial court denied Moskovitz's motion for prejudgment interest only after conducting a lengthy hearing on the matter. During the hearing both sides had adequate opportunity to present their evidence and arguments. Considering the strong disagreement

between the parties with respect to several significant facts as well as the lengthy testimony and evidence presented by Dr. Figgie in rebuttal to Moskovitz's charges, plainly the trial court did not abuse its discretion in concluding that Dr. Figgie had a good faith, objectively reasonable belief that he was not liable. Based on this conclusion I believe the trial court properly held that Dr. Figgie was not obligated, pursuant to *Kalain*, to offer Moskovitz a monetary settlement offer, and that the failure to do so did not reflect a failure of good faith and, of course, did not warrant an award of prejudgment interest.

IV

I strongly believe that the court of appeals correctly reversed and vacated the punitive damage award, reversed the compensatory damage award and remanded the compensatory damage issue for a new trial, and affirmed the denial of the motion for prejudgment interest. Thus, for the foregoing reasons I would affirm the judgment of the court of appeals in part but remand for a new trial on the issue of compensatory damages and the issue of spoliation.

MOYER, C.J., and A. WILLIAM SWEENEY, J., concur in the foregoing dissenting opinion.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 60464, 61166

AARON MOSKOVITZ Plaintiff-appellee CROSS-APPELLANT [Case No. 60464]	JOURNAL ENTRY AND OPINION
[Case No. 61166, appeal by: Charles Kampinski] -vs- MT. SINAI MEDICAL CENTER, ET AL. [Appeal by Harry E. Figgie, III, M.D.] Defendant-appellant Cross-Appellee [Case No. 60464]	JANUARY 7, 1993 Civil appeal from Court of Common Pleas Case No. 158691 AFFIRMED IN PART, REVERSED IN PART AND REMANDED.
DATE OF ANNOUNCEMENT OF DECISION	
CHARACTER OF PROCEEDING	
JUDGMENT	
DATE OF JOURNALIZATION	

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[continued on next page]

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PATTON, J.

Defendant-appellant, Harry Figgie III, M.D., appeals from a jury verdict in favor of plaintiff-appellee, Aaron Moskovitz, et al. Following trial, the jury awarded the appellees a sum in excess of 6.25 million dollars in connection with the death of a sixty-eight year old woman. The appellee was awarded $2,000,000 on the survivorship claims, $1,250,000 on the wrongful death claims, $5,000 for funeral expenses, and $3,000,000 in punitive damages.

The relevant facts giving rise to this appeal are as follows: On October 21, 1988, plaintiff-appellee, Margaret Moskovitz, filed a complaint alleging medical malpractice. On November 21, 1988, she filed an amended complaint. The complaints named as many as sixteen defendants, including appellant, Harry Figgie III, M.D. On December 14, 1988, a suggestion of death was filed indicating that Mrs. Moskovitz died of cancer on December 5, 1988. Thereafter, Aaron Moskovitz, the executor of the estate was substituted as a party and the complaint was amended to include a claim of wrongful death and punitive damages against Dr. Figgie.

A number of defendants were dismissed as discovery progressed. The action proceeded to arbitration on November 16, 1989, with the following defendants: University Hospitals; Mt. Sinai Medical Center; Dr. Howard Fagan; Dr. Nadia Al-Kaisi; Cleveland Physicians, Inc.; Dr.

John Makley; Dr. Harry Figgie III; and University Orthopaedics, Inc. On December 8, 1989, the arbitrators filed their award and findings. Therein, the arbitration board found against Dr. Figgie and University Orthopaedics, Inc. in the amount of $1,300,000.

On December 11, 1989, Dr. Figgie and University Orthopaedics filed a notice of non-acceptance of the arbitration award. The appellee voluntarily dismissed Mt. Sinai, Cleveland Physicians, Inc., Dr. Fagan, Dr. Al-Kaisi and University Hospitals on December 12, 1989. That same day appellee also filed a notice of non-acceptance of the arbitration award.

The case proceeded to trial by jury on the third amended complaint against defendants, Dr. Figgie, Dr. Makley, and their practice group, Orthopaedic Associates. At the close of appellee's case the trial court directed a verdict in favor of Dr. Makley. Following presentation of all the evidence, the appellee dismissed the claims against University Orthopaedics, Inc.

This case principally involves the care rendered to Margaret Moskovitz by Dr. Figgie, a board certified orthopedic surgeon. The complaint alleged that the defendants failed to timely diagnose and treat a cancerous growth on the back of Mrs. Moskovitz's left ankle. Prior to commencing treatment with Dr. Figgie, Mrs. Moskovitz had tumors surgically removed from her left leg in 1978 and 1984. The tumor removed in 1984 was a dermatofibro sarcoma, a tumor which was not malignant but had malignant potential.

Mrs. Moskovitz was initially referred by her primary physician to Dr. Figgie in 1985 as a result of long-standing degenerative arthritis in both knees. At the time she was 65 years of age. In late 1985, Dr. Figgie surgically replaced both knee joints with artificial knee joints. Shortly after the surgery Mrs. Moskovitz developed severe infections in both knees, necessitating a seven-week stay at University Hospitals. The infections were a natural complication of the knee replacements and are unrelated to the issues before us. Treatment of the infections included removal of the artificial knee joints. After successfully treating the infections, Dr. Figgie replaced the left knee joint in May of 1986 and the right knee joint in November of 1986. During the latter hospitalization, Mrs. Moskovitz underwent a chest x-ray which, according to Dr. Figgie and expert testimony, showed that Mrs. Moskovitz's cancer had already spread to her left scapula as of that date. The record is unclear regarding when Mrs. Moskovitz first notified Dr. Figgie that a lump existed on the back of her left ankle.

According to Mrs. Moskovitz's videotaped deposition which was shown at trial, she first noticed the lump in February of 1987. On February 23, 1987, Mrs. Moskovitz saw Dr. Figgie in his office for evaluation of a painful swelling on the back of her left achilles tendon. Dr. Figgie elected to observe the area since the swelling was apparently subsiding. Further, Dr. Figgie testified that Mrs. Moskovitz was reluctant to undergo surgical excision of the mass in light of her multiple knee replacement surgeries and the accompanying complications.

Mrs. Moskovitz continued to see Dr. Figgie throughout 1987 and there were notations concerning the lump in

Dr. Figgie's February 1987 and May 1987 medical records. From February of 1987 to May of 1987 the lump exhibited no changes and continued to measure one by one centimeter.

On August 24, 1987, Mrs. Moskovitz began complaining of mild pain in her scapular region, i.e., shoulder. On September 11, 1987, Mrs. Moskovitz informed Dr. Figgie's office that the lump on the back of her left ankle was increasing in size. As a result, on September 21, 1987, Dr. Figgie ordered X-rays of her left ankle. At this time the lump measured two by two and one-half centimeters. A follow-up visit was conducted on September 23, 1987. After the visit, Dr. Figgie dictated the following entry into Mrs. Moskovitz's office chart:

> Mrs. Moskovitz comes in today for her evaluation on the radiographs [X-rays] reviewed with Dr. York. He was not impressed that this was anything other than a benign problem, perhaps a fibroma. We will thereafter elect to continue to observe. Harry E. Figgie, III, M.D./vp

At some point the last sentence of the above entry was lined through and whited out. Dr. Figgie then added, in his own handwriting, that Mrs. Moskovitz did not want an excisional biopsy so they will continue to observe. Consistent with his routine practice, upon review of the typed entries, Dr. Figgie amended the inaccurate last sentence to accurately reflect his discussion with Mrs. Moskovitz. To further complicate matters the original chart was somehow lost, but fortunately it was able to be reconstructed from copies that had been sent to other physicians who reviewed the X-rays. Significantly, the record is devoid of direct or circumstantial evidence

that Dr. Figgie or anyone on his behalf altered Mrs. Moskovitz's office chart. Specifically, there was no evidence of exactly when the alteration was accomplished, how the alteration was accomplished, or by whom the alteration was accomplished. Dr. Figgie denied whiting out the statement in the chart and indicated he had no knowledge of who had done so. Dr. Figgie's secretary, Linda Kennedy, testified that she handled the patient records and transmitted them by courier to other physicians. Further, she testified that she may have whited out the sentence Dr. Figgie lined through in order to make a cleaner copy for another physician although she could not state with certainty whether she had or had not done so. Despite the inconclusive evidence of any wrongful alteration, the appellee made the alteration claims the focal point of the trial rather than the underlying claims of malpractice.

At Mrs. Moskovitz's next office visit on October 6, 1987, she agreed to have an excisional biopsy after the upcoming Jewish holidays. Following the Jewish holidays, the lump was biopsied on November 13, 1987. By this time the lump had grown to three by five centimeters. The results of the biopsy identified the lump as an epithelioid sarcoma, a rare form of a malignant soft tissue cancer. A bone scan was conducted the same day which revealed the cancer had metastasized, i.e., spread to Mrs. Moskovitz's right femur and right scapula.

Following Mrs. Moskovitz's diagnosis of cancer, her care was immediately transferred to Dr. Figgie's partner, Dr. Makley, an oncology specialist. She was referred for radiation therapy which had little effect. Despite the radiation therapy, the cancer continued to spread and in

February of 1988, Mrs. Moskovitz's left leg was amputated. She ultimately died on December 5, 1988.

The appellee presented the expert testimony of Dr. Engleberg, a medical oncologist at Petaluma Valley Hospital, a ninety-nine bed community hospital located in California. Although Dr. Engleberg never treated a patient with epithelioid sarcoma, he opined that Dr. Figgie should have performed a biopsy at some point prior to November 13, 1987. He testified that an epithelioid sarcoma must be removed before spreading to the bone tissue or lungs if the patient is to recover. Dr. Engleberg testified that the medical records revealed Dr. Figgie essentially did nothing about the lump throughout 1987. He further testified that epithelioid sarcomas which are removed prior to exceeding one and one-half centimeters result in nearly a 100% rate of cure. However, Dr. Engleberg conceded that if the cancer spread prior to October of 1986 nothing would have saved the life of Mrs. Moskovitz. It was Dr. Engleberg's opinion that had the lump been biopsied and removed prior to March of 1987 Mrs. Moskovitz would have been cured. Thus, according to Dr. Engleberg, Dr. Figgie, to a reasonable degree of medical certainty did not provide a reasonable standard of care to Mrs. Moskovitz.

Further review of the record reveals that there was a dispute amongst the experts as to when the cancer spread. Appellant's experts, Dr. Michael Simon, an orthopedic surgeon and professor of orthopedic surgery at the University of Chicago, and Dr. Makley, an oncologist and professor of orthopedic surgery and pathology at Case Western Reserve University, testified that in their opinion the cancer had already spread by November of 1986.

They based their opinion on a re-examination of the X-rays taken of Mrs. Moskovitz's left scapula and right femur prior to her last knee replacement surgery in November of 1986. They identified black spots on the X-ray as being indicative of the cancer's spreading at that time. Further, appellant's experts disagreed with Dr. Engleberg's opinion that epithelioid sarcomas less than one and one-half centimeters in diameter tend not to metastasize and if removed prior to exceeding one and one-half centimeters result in nearly a 100% rate of cure. Dr. Simon and Dr. Makley each concluded that Dr. Figgie did not deviate from the accepted standards of care in rendering treatment to Mrs. Moskovitz. In their opinion, Mrs. Moskovitz's epithelioid sarcoma metastasized by November of 1986 thereby rendering her death imminent.

The above testimony of appellant's experts was contradicted by the rebuttal testimony of Dr. Ralph J. Alfidi, a radiologist, who after reviewing X-rays taken on November 3, 1986 concluded that there was no indication that the cancer had spread by that date. He opined that black spots which appear on the x-rays generally signify a simple loss of bone density which commonly occurs in post-menopausal women. However, Dr. Alfidi never specifically commented on the black spots which appeared on the November of 1986 x-ray taken of Mrs. Moskovitz's left scapula.

On December 20, 1989, the jury returned its verdict against Dr. Figgie. The jury awarded appellee in excess of 6.25 million dollars: $2,000,000 on the survivorship claim, $1,250,000 on the wrongful death claim; $5,000 for funeral expenses; and $3,000,000 in punitive damages in connection with the death of a sixty-eight year old woman.

The trial court overruled Dr. Figgie's motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. The trial court also overruled appellee's motion for prejudgment interest. On September 10, 1990, Dr. Figgie filed a timely appeal in Case No. 60464. The appellee filed a cross-appeal on September 17, 1990. In addition, Dr. Makley filed a motion for Civ.R. 11 sanctions against appellee's counsel, Charles Kampinski. A successor judge to the trial judge granted Dr. Makley's motion for sanctions awarding him $4,000. The trial court specifically found that appellee's counsel failed to present any expert medical testimony tending to establish that Dr. Makley's treatment deviated from the accepted standards of care. Thus, the trial court held that appellee's counsel acted to defeat the purpose of Civ.R. 11 by bringing a meritless and unsupported claim against Dr. Makley. On January 10, 1991, Mr. Kampinski filed a timely appeal from the sanction order which was assigned Case No. 61166.

Case Nos. 60464 and 61166 were consolidated sua sponte for our hearing and disposition.

I.

Dr. Figgie's first assignment of error provides:

I. THE TRIAL COURT ERRED IN SUSTAINING THE JURY'S AWARD OF PUNITIVE DAMAGES.

In the first assignment of error, Dr. Figgie contends that the trial court erred in sustaining the jury's award of punitive damages.

Initially, Dr. Figgie avers that the appellee failed to establish that the alleged post-diagnosis alteration of Mrs. Moskovitz's medical records caused a specific compensable injury. Dr. Figgie argues that the alleged post-diagnosis alteration of the records must independently give rise to a compensable injury in order to justify the award of punitive damages. For the following reasons appellant's argument has merit.

It is well-established that "[e]xemplary or punitive damages may not be awarded in the absence of proof of actual damages." *Shimola v. Nationwide* (1986), 25 Ohio St.3d 84, 86; *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 27, upholding paragraph one of the syllabus in *Richard v. Hunter* (1949), 151 Ohio St. 185. As stated by the *Bishop* court, "Punitive damages are awarded as punishment for *causing compensable* harm and as a deterrent against similar action in the future. (Emphasis added). *Bishop, supra,* at 28. "No civil cause of action in this state may be maintained simply for punitive damages." *Id.*

Moreover, prior caselaw establishes that later concealment of an act of negligence by a defendant hospital alone does not afford a basis for punitive damages. *Rouse v. Riverside Methodist Hospital* (1983), 9 Ohio App.3d 206, 208.

In the instant case appellee claimed entitlement to compensatory damages based on the alleged negligence of Dr. Figgie in failing to timely diagnose Mrs. Moskovitz's cancer. Appellee claimed entitlement to punitive damages based on the alleged alteration of medical records. In essence, appellee contends that the jury's finding of liability on the underlying malpractice action

may constitute the requisite compensable harm or actual damages necessary to sustain the award of punitive damages. We disagree. Such a contention is legally insupportable as no actual damages resulting from the alleged alteration were established at trial. In order to recover punitive damages the appellee was required to prove that she suffered a harm distinct from the medical negligence claim and attributable solely to the alleged alteration of medical records. *Shimola, supra; Bishop, supra; Rouse, supra.* This the appellee has failed to do and as such we conclude the award of punitive damages was erroneous. To hold otherwise would require this court to ignore the legal proposition that no cause of action may be maintained simply for punitive damages. *Bishop, supra.*

Dr. Figgie also contends that the evidence adduced by the appellee was insufficient to warrant a finding of actual malice. For the following reasons appellant's argument has merit.

In order to award punitive damages a jury must first determine that a defendant has acted with malice. *Smithhisler v. Dutter* (1952), 157 Ohio St. 454; *Preston v. Swinehart* (1960), 170 Ohio St. 441; *Detling v. Chudzicki* (1982), 70 Ohio St.2d 134. The evidence must be sufficient to establish actual malice. *Calmes v. Goodyear Tire & Rubber* (1991), 61 Ohio St.3d 470. Prior cases have identified two general categories of conduct by which malice may be shown, either actual or by inference. *Id.* In *Preston v. Murty* (1987), 32 Ohio St.3d 334, it was established that punitive damages may be awarded upon proof of conduct characterized by (1) hatred, ill will or a spirit of revenge or (2) a conscious disregard for the rights and

safety of other persons that has a great probability of causing substantial harm.

At trial, appellee claimed entitlement to punitive damages based on Dr. Figgie's alleged alteration of Mrs. Moskovitz's medical records. Appellee claimed that Dr. Figgie altered office notes from Mrs. Moskovitz's September 23, 1987 visit at a date subsequent to her diagnosis with epithelioid sarcoma in November of 1987. Specifically, it was claimed that Dr. Figgie deleted "we will therefore elect to continue to observe" and added in his own handwriting "as she does not want excisional bx [biopsy] we will observe." Dr. Figgie testified that consistent with his routine practice he reviewed his dictated and typed entries and upon review of the September 23, 1987 entry, he discovered a discrepancy. After discovering the discrepancy, he amended the inaccurate last sentence of the typed entry by lining it through and added the above statement in his own handwriting to accurately reflect his discussion with Mrs. Moskovitz. According to Dr. Figgie, such conduct is consistent with accepted medical practice. He denied whiting out the statement in his records and indicated he did not know who had done so. Further, Dr. Figgie's secretary who was responsible for transmitting patient records to other physicians testified that she may have whited out the statement in order to make a cleaner copy for another physician although she could not state with certainty whether she had or had not done so.

We must now determine whether the record contains sufficient evidence to establish actual malice as defined in *Preston, supra*. After a thorough review of the record we answer the query in the negative.

Initially, we conclude the record in the instant case contains no evidence to establish that Dr. Figgie's alleged conduct of altering Mrs. Moskovitz's medical records was characterized by hatred, ill will or a spirit of revenge. The appellee failed to provide evidence to establish that Dr. Figgie acted with the requisite intent to harm the appellee under the first standard enunciated in *Preston*. At trial, Dr. Figgie testified that he amended the September 23, 1987 entry after discovering that the typed version contained inaccurate information. Consistent with accepted medical practice, he amended the entry by lining through the inaccurate portion and added the correct information to accurately reflect his discussion with Mrs. Moskovitz. It was also established that Dr. Figgie had no involvement in transmitting patient records to other physicians. Moreover, Dr. Figgie's secretary testified that she may have whited out the lined through portion of the entry in order to make a cleaner copy for another physician.

The appellee presented no additional evidence on the circumstances surrounding the alleged alteration. Significantly, the record is devoid of evidence that Dr. Figgie or anyone on his behalf or at his direction altered Mrs. Moskovitz's office chart in order to compromise her malpractice claim. In fact, all of the evidence and testimony presented at trial refuted such a contention. Thus, we find that the evidence does not support a finding of actual malice based upon hatred, ill-will or a spirit of revenge and a contrary finding is purely speculative. *Preston, supra*.

Further, we are not persuaded that Dr. Figgie's alleged conduct constituted a conscious disregard for the appellee's rights and safety which had a great probability

of causing Mrs. Moskovitz substantial harm under the second prong of the *Preston* test. In the instant case, the appellee alleged the records were improperly altered approximately two months after Mrs. Moskovitz's September 23, 1987 visit, at a time subsequent to her diagnosis with epithelioid sarcoma in November of 1987. Immediately following the cancer diagnosis in November of 1987, Mrs. Moskovitz's care was transferred to Dr. Figgie's partner, Dr. Makley, an oncology specialist. Dr. Figgie was not thereafter involved in Mrs. Moskovitz's cancer treatment. In light of the fact that Dr. Figgie was not involved in Mrs. Moskovitz's post-diagnosis treatment, we conclude that the alleged alteration did not adversely impact that treatment and thus it cannot be plausibly argued that the alteration had a great probability of causing substantial harm. Moreover, there is no indication that the alleged alteration adversely impacted the appellee's pursuit of her medical malpractice claim as the appellee was able to reconstruct the medical records from copies sent to other treating physicians.

Obviously, this court abhors the intentional alteration of a patient's medical records. However, it is our solemn obligation to determine that the verdict is consistent with the law and evidence. In the instant case there is no direct or circumstantial evidence that Dr. Figgie or anyone on his behalf or at his direction altered Mrs. Moskovitz's medical records in order to compromise her malpractice claims. Hence, we conclude that the issue of punitive damages should not have been submitted to the jury. Simply stated, there is a lack of substantial, competent and credible evidence to establish actual malice. *Calmes*,

supra; Preston, supra. Thus, it was erroneous for the jury to consider and award punitive damages.

Dr. Figgie also alleges error in the trial court's punitive damage instruction. Specifically, he contends the punitive damage instruction was so vague, without standards and contrary to Ohio law that the jury's verdict awarding punitive damages violates due process. We reject Dr. Figgie's contention.

The trial court's instruction to the jury provided in relevant part:

> Now, it is the law in Ohio that punitive damages may not be awarded in a wrongful death cause of action. Punitive damages, however, may be awarded in a survivorship action brought by the representative of the deceased's estate or in an action for the loss of the deceased person's services or consortium.
>
> Now, the purpose of awarding punitive damages is to punish a wrongdoer and to hold him up as an example to others in order to deter another person from performing in a like or similar manner.
>
> If you find for the plaintiff and award damages, actual damages, you may also consider whether or not you will separately award punitive damages.
>
> Obviously, if you do not find actual damages, you cannot consider punitive damages on the survivorship claim.
>
> Now, punitive damages may be awarded against a defendant as a punishment to discourage others from committing similar wrongful acts.

> You are not required to award punitive damages to the plaintiff, and you may not do so unless you find by the greater weight of the evidence that the defendant acted with actual malice.
>
> Actual malice is either that state of mind under which a person is characterized by hatred, ill will or a spirit of revenge, or is a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

(Tr. 782-783.)

Review of the trial court's punitive damage instruction reveals that it sets forth the standards enunciated in *Preston, supra.* We thus find no error in the trial court's punitive damage instruction. The trial court's charge sufficiently set forth the law in Ohio concerning the imposition of punitive damages. Contrary to Dr. Figgie's contentions, the trial court's instruction on punitive damages was not so vague, without standards and contrary to Ohio law, as to result in a violation of due process. As stated above, the trial court's charge was proper. As such, it in no way violated Dr. Figgie's due process rights.

Next, Dr. Figgie argues that comments made by appellee's counsel during closing argument prejudicially impacted the jury's punitive damage award. Dr. Figgie has waived errors in appellee's closing argument by failing to make a timely objection to counsel's alleged misconduct. *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40.

Consistent with the foregoing, Dr. Figgie's first assignment of error is sustained and we reverse and vacate the jury's award of punitive damages.

II.

Dr. Figgie's second assignment of error provides:

> II. THE TRIAL COURT ERRED BY DENYING DR. FIGGIE'S MOTION FOR DIRECTED VERDICT BECAUSE THE OPINION TESTIMONY OF PLAINTIFF'S EXPERT MEDICAL WITNESS SHOULD HAVE BEEN EXCLUDED.

In essence, Dr. Figgie argues the trial court erred in admitting the expert medical testimony of appellee's witness, Dr. Engleberg. Specifically, it is maintained that Dr. Engleberg's testimony should have been excluded pursuant to Evid.R. 703 because the medical literature he reviewed prior to rendering his expert opinion was not offered into evidence. Dr. Figgie's argument lacks merit.

Evid.R. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him *or admitted in evidence at the hearing*. (Emphasis added.)

Evid.R. 703 permits an expert to render an opinion if it is based on his own observation of facts or data admitted into evidence. *State v. Jones* (1984), 9 Ohio St.3d 123. Moreover, an expert necessarily brings to each case knowledge of facts or data which are not in evidence for

it is the knowledge which qualifies a witness as an expert. Thus, an expert may apply to the facts in evidence scientific principles, theories, calculations, measurements or tables – which have qualified the witness as an expert. Such principles, theories, calculations, measurements or tables need not be in evidence if the predicate facts are in evidence. *State v. Minor* (1988), 47 Ohio App.3d 22.

Review of the record reveals that the predicate facts were in evidence in the form of medical records. In rendering his expert opinion, Dr. Engleberg examined Mrs. Moskovitz's medical records and the depositions of Mrs. Moskovitz's treating physicians. In addition, he reviewed medical literature on epithelioid sarcomas. At trial, Dr. Engleberg indicated that his opinions were based on his training, experience, expertise, and all of the facts and medical records in evidence, not just his knowledge of the medical literature.

Although the medical literature was not offered into evidence, we conclude that the facts upon which the expert's opinion was based were in evidence by way of Mrs. Moskovitz's medical records. Since the predicate facts were admitted into evidence, we find that Dr. Engleberg's testimony was properly considered pursuant to Evid.R. 703.

Accordingly, Dr. Figgie's second assignment of error is overruled.

III.

Dr. Figgie's third assignment of error provides:

III. THE TRIAL COURT ERRED BY FAILING TO DIRECT A VERDICT FOR DR. FIGGIE AT THE CLOSE OF ALL THE EVIDENCE.

Dr. Figgie argues that a verdict should have been directed in his favor. Specifically, he contends the evidence presented by the appellee failed to establish that his negligence proximately caused the death of Mrs. Moskovitz. Dr. Figgie's contention lacks merit.

Civ.R. 50(A)(4) specifies that:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

Further, where there is substantial evidence to support the claim of the party opposing the motion upon which reasonable minds may reach different conclusions, the motion for a directed verdict must be denied. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347. In ruling upon a motion for a directed verdict, a court should not consider the weight of the evidence or credibility of the witnesses. *Id.*

In order to entitle a plaintiff in a medical malpractice action to have his case submitted to a jury, he must produce evidence upon each essential element to establish liability or, in the alternative, produce evidence of a fact upon which a reasonable inference may be predicated to support each element. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282. Further, in order to establish a cognizable claim of medical malpractice, a plaintiff must show the existence of a standard of care within the medical community, breach of the standard of care by the defendant-physician, and proximate cause between the medical negligence and the injury sustained. *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 93; *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. Moreover, proximate cause is established when a plaintiff provides the trier of fact with evidence that the injury was more likely than not caused by defendant's negligence. *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 369; *Cooper v. Sisters of Charity, Inc.* (1971), 27 Ohio St.2d 242, 247.

After reviewing the record, we find that the appellee produced at least some evidence on each element of medical malpractice, including proximate cause. Thus, we affirm the jury's finding of liability in the medical malpractice claim. Appellee's expert, Dr. Engleberg, testified that Dr. Figgie should have biopsied the lump in November of 1986. He further testified that had the biopsy been performed and the lump been removed prior to February of 1987, Mrs. Moskovitz would have survived. At trial Dr. Engleberg offered the following testimony:

A. My opinion is that Dr. Figgie violated the standard of care.

Q. Then tell the jury why you say that.

A. Well, it is really straightforward. You have a lump in a patient with a previous tumor with malignant potential and you've got to biopsy it to make sure it is not cancer. There's no way to tell by looking at it. And if you get it soon enough, then you can cure the patient. If you wait too long, as was done in this patient, then the patient dies of her disease.

Q. Do you have any opinion to a reasonable degree of medical certainty as to whether or not that had it been removed in 1986, whether Mrs. Moskovitz would have been cured? First of all do you have an opinion?

A. Yes.

Q. And what is your opinion?

A. My opinion is that if it had been excised in 1986 the patient could have been cured of her disease.

Q. Do you have an opinion to a reasonable degree of medical certainty, doctor, as to whether or not in any part of 1987 whether it would have been removed then, whether she would have been cured of her disease? Do you have an opinion?

A. Yes.

Q. And what is your opinion, doctor?

A. My opinion is that if they had still removed the lesion in the early part of 1987, the patient still would have been cured of her disease.

(Tr. 255-256.)

In rebuttal, Dr. Figgie presented the expert testimony of Dr. Simon and Dr. Makley. Dr. Figgie's experts opined that X-rays taken of Mrs. Moskovitz just prior to her November of 1986 knee replacement surgery showed that the cancer had already spread to her femur and scapula. They thus concluded Mrs. Moskovitz would have died despite any actions that might have been taken by Dr. Figgie. However, during the course of the expert testimony, it was revealed that X-rays are not normally utilized in the diagnosis of bone cancer. The preferred method of diagnosis is through the use of bone scans. Further, Dr. Alfidi, a radiologist, testified that the shadows or dark spots on the X-rays of Mrs. Moskovitz's femur represented "loss of bone density as a result of aging and post-menopausal status." As Dr. Figgie points out, Dr. Alfidi did not specifically comment on the chest X-rays; however, in light of Dr. Alfidi's testimony, the jury could reasonably conclude that the dark spot pointed out on the scapula represented a loss of bone density and not cancer as Dr. Figgie's experts suggested.

Consistent with the foregoing, we conclude the appellee produced competent, credible evidence upon each essential element of medical malpractice. Although Dr. Figgie's experts attempted to refute the expert testimony of Dr. Engleberg, we specifically find there was evidence presented upon which reasonable minds could reach different conclusions. Accordingly, the motion for directed verdict was properly denied and we affirm the jury's finding of liability in the medical malpractice action.

Dr. Figgie's third assignment of error is thus overruled.

IV.

Dr. Figgie's fourth assignment of error provides:

IV. THE COMPENSATORY DAMAGE AWARD WAS EXCESSIVE AND THE PRODUCT OF PASSION AND PREJUDICE.

In his fourth assignment of error, Dr. Figgie claims the jury's compensatory damage award is manifestly excessive, appearing to have been rendered under the influence of passion and prejudice. He thus urges us to vacate the compensatory damage award and remand the action for a new trial. For the following reasons the argument has merit.

A new trial may be granted where a jury awards damages under the influence of passion or prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28; *Jones v. Meinking* (1987), 40 Ohio App.3d 45; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42.

In the instant case, the jury awarded the appellee $2,000,000 on the survivorship claims and $1,250,000 on the wrongful death claim for a total of $3,250,000 in compensatory damages.

Initially, we will address the propriety of the jury's survivorship award. The bulk of the jury's $2,000,000 survivorship award can be attributed to compensation for the pain and suffering experienced by Mrs. Moskovitz prior to her death.

Mrs. Moskovitz was diagnosed with cancer in November of 1987. Thereafter, she unsuccessfully underwent radiation therapy treatments and in February of

1988 her left leg was amputated. While travelling to the hospital to be fitted for a prosthesis, Mrs. Moskovitz fell and fractured her hip. In addition, she underwent chemotherapy treatments prior to her death.

Although it is uncontroverted that Mrs. Moskovitz experienced pain and suffering from the time of her diagnosis with cancer in November of 1987 until her death approximately one year later on December 5, 1988, we find that the jury's $2,000,000 survivorship award is so high that to permit the award to stand would be a denial of substantial justice. *Hancock v. Norfolk & Western Rd. Co.* (1987), 39 Ohio App.3d 77. Further, we are persuaded that the jury's survivorship award was impermissibly influenced by the jury's erroneous consideration of punitive damages. See discussion *supra*. Review of the transcript reveals that the appellee made the punitive damage claim the primary focus throughout the trial. In the opening statement appellee's counsel emphasized the alteration claim rather than the malpractice claim. At trial, the appellee called Dr. Figgie as the first witness and proceeded to question him as if he were under cross-examination. A majority of the questions directed to Dr. Figgie by appellee's counsel concerned the alteration claim and not the medical malpractice claim. Moreover, appellee's counsel vigorously argued throughout the entire course of the trial that Dr. Figgie attempted to conceal his negligent treatment of Mrs. Moskovitz by subsequently altering her medical records.

In light of the substantial nature of the survivorship award and taking into consideration the great emphasis placed upon the punitive damage and alteration aspects of the case by appellee's attorney, it is only reasonable to

conclude that the jury was wrongfully influenced by the erroneous consideration of punitive damages. We thus are persuaded that the survivorship award was rendered as a result of passion and prejudice and therefore find that Dr. Figgie is entitled to a new trial to determine survivorship damages.

Next we will address the propriety of the jury's wrongful death award. R.C. 2125.02(B) provides that compensatory damages in a wrongful death action may include:

> (1) Loss of support from the reasonably expected earning capacity of the decedent;
>
> (2) Loss of services of the decedent;
>
> (3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;
>
> (4) Loss of prospective inheritance, to the decedent's heirs at law at the time of his death;
>
> (5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

Ohio's wrongful death statute, R.C. 2125.02, "allows the decedent's beneficiaries to recover, in addition to the pecuniary loss suffered as a consequence of the decedent's death, damages generally for the loss of services of the decedent; loss of the society of the decedent, as well as the mental anguish incurred by the beneficiaries." *French v. Dwiggins* (1984), 9 Ohio St.3d 32, 34.

Generally, a jury's verdict on a wrongful death action will not be set aside unless it is so excessive that it appears to have been the result of passion or prejudice. *Dawson v. Cleveland Metropolitan General Hospital* (Nov. 20, 1986), Cuyahoga App. Nos. 51052, 51779, unreported, citing *Jones v. Wittenberg Univ.* (1976), 534 F.2d 1203.

The evidence adduced at trial established that Mrs. Moskovitz was in a frail condition prior to the onset of her terminal illness. In 1985, at the age of sixty-five, Mrs. Moskovitz had both knee joints surgically replaced. Shortly after the surgery she developed severe infections necessitating a seven week stay at University Hospitals. Treatment of the infections included removal of the artificial joints. Following successful treatment for the infections, her knee joints were again replaced in May of 1986 and November of 1986 respectively. Following the knee replacements she had difficulty walking and was unable to bend her knees. Further, the evidence established that Mrs. Moskovitz had not been employed for approximately twenty years and she did not provide economic support to her family. Plaintiff's expert economist testified that the total cost of replacing the services Mrs. Moskovitz rendered to her family would be between $67,506 and $282,614. In addition, appellee's expert testified that the present values of Mrs. Moskovitz's stipend she received from Germany and social security benefits amounted to $30,521 and $22,891, respectively.

In light of the above, we find that the $1,250,000 wrongful death award is so high that to permit the award to stand would be a denial of substantial justice. *Hancock, supra.* In our opinion, the award is manifestly excessive when one considers the factors enumerated in R.C.

2125.02(B) and where, as here, the wrongful death award is in excess of four times the maximum economic loss as estimated by appellee's economist. Moreover, it is reasonable to conclude that the following references to Mrs. Moskovitz's concentration camp experience by her attorney during closing argument may have wrongfully influenced the jury and resulted in passion or prejudice:

> Was she [Mrs. Moskovitz] depressed as a result of her concentration camp experience? You bet she was. And I don't blame her. She should have been. And we're not here seeking your sympathy. We're not here seeking your empathy, although it ought to be there. We're here seeking your justice, ladies and gentlemen.

(Tr. 756-57.)

What kind of lady is it that they're trying to blame? What kind of woman is it that you heard about? The lady who, in the concentration camp, and this is not for your sympathy, but you're entitled to know what kind of woman she was. You are entitled to know that because you're going to make a decision based upon that knowledge.

She was a lady who put her own life in danger for others. She's a lady, when they were leaving Czechoslovakia, who took the chance of being found out to let somebody else in on the train.

(Tr. 759-60.)

While it is true that both parties presented evidence during trial of Mrs. Moskovitz's concentration camp experience and the effects thereof, appellee's counsel initially referred to the subject in his opening statement and

only appellee's counsel referred to the concentration camp experience during closing argument. We believe that the appellee's reference to such a highly emotional topic certainly appealed to the sympathy and passion of the jury and wrongfully influenced its award.

Although, it is uncontroverted that Mrs. Moskovitz experienced pain and suffering during the one year period preceding her death and that her family suffered the loss of a loving wife and mother, it is this court's solemn obligation to determine that the verdict is consistent with the law and evidence. While there certainly was evidence presented of injury sustained by the appellee and his representatives, the award of $3,250,000 does not reasonably coincide with the harm suffered. Cf. *Rady v. Forest City Enterprises, Inc.* (1986), 27 Ohio Miysc.2d 36, 37. Accordingly, we must sustain Dr. Figgie's fourth assignment of error, thereby vacating the excessive compensatory damage awards and remand for a new trial on compensatory damages alone.

V.

Dr. Figgie's fifth assignment of error provides:

> V. THE TRIAL COURT SHOULD HAVE REDUCED THE JURY'S VERDICT IN THE SURVIVAL ACTION TO $200,000 PURSUANT TO R.C. 2307.43.

Dr. Figgie argues that the trial court erred by failing to reduce the jury's survivorship award from $2,000,000

to $200,000 pursuant to R.C. 2307.43. Dr. Figgie's claim lacks merit.

R.C. 2307.43 provides:

> In no event shall an amount recovered for general damages in any medical claim, as defined in division (D) of section 2305.11 of the Revised Code, not involving death exceed the sum of two hundred thousand dollars.

The Ohio Supreme Court has recently struck down R.C. 2307.43 as being unconstitutional in violation of due process. The Ohio Supreme Court held that R.C. 2307.43 does not bear a real and substantial relation to public health or welfare and it is unreasonable and arbitrary. *Morris v. Savoy* (1991), 61 Ohio St.3d 684.

Given the Supreme Court's declaration that R.C. 2307.43 is unconstitutional, Dr. Figgie's fifth assignment of error lacks merit and is overruled.[1]

VI.

Appellee raises the following cross-assignment of error:

I. THE TRIAL COURT ERRED IN NOT ASSESSING PREJUDGMENT INTEREST.

Appellee's cross-appeal challenges the trial court's denial of prejudgment interest. Specifically, appellee argues Dr. Figgie failed to make a good faith effort to

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[1] The fifth assignment of error was orally withdrawn by counsel of the appellant during oral argument.

settle the case prior to trial, thereby entitling them to prejudgment interest. Appellee's argument lacks merit.

Prejudgment interest is awarded pursuant to R.C. 1343.03(C), which provides as follows:

(C) Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

An award of prejudgment interest is within the sound discretion of the trial court. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. Further, a reviewing court will not overturn an award or denial of prejudgment interest unless the trial court abused its discretion. *Kalain v. Smith* (1986), 25 Ohio St.3d 157. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In *Kalain, supra,* the Supreme Court of Ohio held in its syllabus:

> **A party has not "failed to make a good faith effort to settle" under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential**

> liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. *If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.* (Emphasis added.)

In the instant case, the evidence adduced reveals that Dr. Figgie possessed a good faith, objectively reasonable belief that he was not liable. Specifically, it was Dr. Figgie's contention throughout the course of the proceedings that Mrs. Moskovitz's cancer spread prior to the time she informed him of the lump. Further, the testimony of Dr. Figgie's medical experts supported his position that the cancer had spread prior to November of 1986. Thus, Dr. Figgie attempted to show that any negligence on his part was not the proximate cause of Mrs. Moskovitz's death. Had the jury accepted Dr. Figgie's defense, they would have found no liability.

Given the record before us, we find that Dr. Figgie was not obligated to make a monetary settlement offer because he possessed a good faith, objectively reasonable belief that he was not liable. *Kalain, supra.* Thus, we are unable to conclude that the trial court's denial of prejudgment interest was an abuse of discretion. Therefore, we affirm the denial of prejudgment interest and overrule appellee's cross-appeal.

VII.

Appellee's attorney, Mr. Kampinski's first assignment of error provides:

> I. THE TRIAL COURT ERRED IN ENTERTAINING APPELLEE'S MOTION BECAUSE APPELLEE DID NOT PRESENT THE CLAIM APPROPRIATELY OR IN A TIMELY MANNER.

Appellee's attorney contends the trial court lacked jurisdiction to rule on Dr. Makley's Civ. R. 11 motion for sanctions because the motion was untimely filed. Appellee's argument lacks merit.

The trial court journalized Dr. Makley's directed verdict on December 27, 1989. The jury's verdict was journalized on December 28, 1989. On January 10, 1990, Dr. Figgie filed a motion for judgment notwithstanding the verdict and a motion for new trial. These motions were ultimately denied on August 21, 1990. Thereafter, on September 7, 1990, Dr. Makley filed his Civ. R. 11 motion for sanctions.

Civ. R. 11 does not specify any time limits within which a motion for sanctions must be filed. In the instant case, Dr. Makley filed his Civ. R. 11 motion seventeen days after the trial court entered final judgment by denying Dr. Figgie's motions for judgment notwithstanding the verdict and new trial. We find that Dr. Makley's Civ. R. 11 motion was filed within a reasonable time of final judgment and thus conclude it was timely. The fact that the trial judge's successor ruled on Dr. Makley's motion does not change our conclusion. A successor judge may rule on post-trial motions even though the successor

judge did not preside over the underlying trial. See, *Elsnau v. Weigel* (1983), 5 Ohio St.3d 77.

The contention that the trial court lacked jurisdiction to impose sanctions because the case was on appeal also lacks merit.

Generally the trial court is divested of jurisdiction when an appeal is taken. However, the trial court retains jurisdiction over issues which are not inconsistent with the appellate court's power to review, affirm, modify or reverse the judgment appealed from. *State, ex rel. Special Prosecutors, v. Judges* (1978), 55 Ohio St.2d 94. Moreover, it has been held that a trial court retains jurisdiction to decide a Civ. R. 11 motion for sanctions even though the underlying action has been appealed because the trial court's decision to grant or deny the motion does not affect the appellate court's power to review the appealed judgment. *Newman v. Al Castrucci Ford Sales, Inc.* (1988), 54 Ohio App.3d 166, 169.

Herein, the trial court's decision to grant the Civ. R. 11 motion for sanctions was collateral to the appeal of the jury's verdict. Thus, the trial court retained jurisdiction to rule on the motion.

Accordingly, the first assignment of error of the appellee's attorney is overruled.

VII.

Appellee's attorney, Mr. Kampinski's second and third assignments of error are interrelated and will be discussed together. They provide:

> II. CIVIL RULE 11 DOES NOT PROVIDE A SEPARATE CAUSE OF ACTION FOR DAMAGES.
>
> III. THE TRIAL COURT ABUSED IT'S [sic] DISCRETION BY AWARDING DAMAGES WHEN THE APPELLEE ADMITTED HE SUSTAINED NO DAMAGES.

In his second assignment of error appellee's attorney contends Dr. Makley's Civ. R. 11 motion for sanctions impermissibly constitutes a separate cause of action for damages. We disagree.

While Civ. R. 11 does not provide for an independent cause of action cognizable in a separate suit, it does authorize a court to impose sanctions in the course of an action under its supervision. *Mitchell v. Whitaker* (1986), 33 Ohio App.3d 170, 172.

In the instant case, Dr. Makley's Civ. R. 11 motion was not brought as an independent cause of action, but rather was brought in connection with appellee's underlying malpractice action which remained under the trial court's supervision. Under these circumstances, Civ. R. 11 authorizes the trial court to impose sanctions.

In his third assignment of error appellee's attorney contends the trial court erred in awarding sanctions since Dr. Makley sustained no damages from the alleged Civ. R. 11 violation. The contention lacks merit.

During the Civ. R. 11 hearing Dr. Makley testified that his practice as an orthopedic oncologist is devoted to the care and treatment of benign and malignant tumors in bone and soft tissues. Further, his usual, customary and average income from his practice is $500 per hour and as a result of being named as a defendant in this case, he was forced to attend four days of trial thereby losing approximately forty-one hours from his medical practice.

Although Dr. Makley continued to receive a salary from his practice group, University Orthopaedic Associates, his forced presence at trial resulted in a loss of personal and practice group income which would have been generated had he been able to practice medicine instead of being present at trial. Thus, we conclude that Dr. Makley suffered damages as a result of being named as a defendant in the instant case.

Accordingly, the second and third assignments of error of appellee's attorney are overruled.

IX.

Appellee's attorney, Mr. Kampinski's fourth assignment of error provides:

> IV. THERE WERE GOOD GROUNDS TO SUPPORT THE PLEADINGS AGAINST DR. MAKLEY.

In his fourth assignment of error appellee's attorney contends that the pleading naming Dr. Makley as a defendant was filed in good faith with adequate supporting grounds. He thus argues that the trial court abused its discretion by imposing $4,000 in sanctions pursuant to

Civ. R. 11. The argument of appellee's attorney lacks merit.

The complaint against Dr. Makley alleged that he unnecessarily amputated Mrs. Moskovitz's left leg and that he informed her the purpose of the amputation was to cure her as opposed to easing her pain.

Civ. R. 11 provides in pertinent part:

> * * * The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate action. Similar action may be taken if scandalous or indecent matter is inserted.

The purpose of Civ. R. 11 is to ensure that a pleading is filed in good faith with adequate supporting grounds. *Stevens v. Kiraly* (1987), 24 Ohio App.3d 211. Further, a trial court's decision imposing sanctions pursuant to Civ. R. 11 will not be reversed absent an abuse of discretion. *State, ex rel. Fant, v. Sykes* (1987), 29 Ohio St.3d 65.

In the instant case, the trial court conducted a hearing, reviewed the record, and reviewed the supplemental materials filed by the respective parties. Thereafter, the trial court specifically found that appellee's counsel failed to present any expert medical testimony tending to establish that Dr. Makley's treatment deviated from the

accepted standards of care. Further, the court specifically held that appellee's attorney acted to defeat the purpose of Civ. R. 11 by bringing a meritless and unsupported claim against Dr. Makley. Thus, the trial court imposed sanctions against appellee's attorney " * * * on the basis of Dr. Makley's lost income from his medical practice on those dates when Dr. Makley attended trial under subpoena by plaintiff's counsel and prior to his dismissal on his motion for directed verdict." Dr. Makley was granted Civ. R. 11 sanctions by the trial court in the amount of $4,000.

After a thorough review of the record, we find that the trial court did not abuse its discretion by imposing Civ. R. 11 sanctions in the amount of $4,000 against appellee's attorney. A plaintiff may not establish a prima facie case of medical malpractice absent expert testimony demonstrating a deviation from the accepted standard of care. *Hoffman v. Davidson* (1987), 31 Ohio St.3d 60. In the instant case, the appellee presented absolutely no expert testimony concerning Dr. Makley's breach of the accepted standard of care. Appellee's attorney refers us to the October 16, 1989 deposition testimony of his medical expert, Dr. Engleberg. Therein, Dr. Engleberg reserved his opinions regarding Dr. Makley's care of Mrs. Moskovitz until he was provided additional facts concerning the extent of Mrs. Moskovitz's pain and the purpose of her amputation. Dr. Engleberg was never provided these additional and necessary facts. Thus, he was never able to formulate an expert opinion as to whether Dr. Makley breached the accepted standard of care. Further, nowhere in his deposition testimony does Dr. Engleberg affirmatively state that Dr. Makley did in fact breach the

accepted standard of care. Absent such expert testimony, appellee's medical malpractice claim against Dr. Makley was groundless.

We conclude the appellee's failure to present the required expert testimony justified the trial court's award of Civ. R. 11 sanctions in the amount of $4,000. Thus, we affirm the trial court's award of Civ. R. 11 sanctions against appellee's attorney.

Accordingly, the fourth assignment of error of appellee's attorney is overruled.

* * *

Consistent with this court's disposition, we affirm the finding of liability in the medical malpractice action, we reverse the compensatory damage award and remand for a new trial on compensatory damages alone, and we reverse and vacate the award of punitive damages. Additionally, the trial court's denial of prejudgment interest is affirmed and the trial court's award of Civ. R. 11 sanctions is affirmed.

Judgment accordingly.

It is ordered that appellant/cross-appellee, Harry E. Figgie, III, M.D. and appellee/cross-appellant, Aaron Moskovitz, equally split the costs herein taxed in Case No. 60464; it is also ordered that appellee, John Makley, M.d [sic]., shall recover of appellant, Charles Kampinski, his costs herein taxed in Case No. 61166.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLACKMON, J., CONCURS.

HARPER, J., DISSENTS.
SEE DISSENTING OPINION ATTACHED.

/s/ John T. Patton
PRESIDING JUDGE
JOHN T. PATTON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 60464, 61166

AARON MOSKOVITZ Plaintiff-Appellee and Cross-Appellant (Case No. 60464)	:	
[Case No. 61166, appeal by: Charles Kampinski]	:	DISSENTING OPINION
-vs-	:	
MT. SINAI MEDICAL CENTER, ET AL.	:	
[Appeal by Harry E. Figgie, III, M.D.]	:	
Defendant-Appellant and Cross-Appellee (Case No. 60464)	:	

DATE OF ANNOUNCEMENT OF DECISION — JANUARY 7, 1993

HARPER, J., dissenting:

I respectfully dissent from the majority's resolution of appellant Dr. Figgie's first and fourth assignments of error, appellee's cross assignment of error, and appellant Mr. Kampinski's second, third and fourth assignments of error. Specifically, I disagree with the positions that the trial court erred in sustaining the jury's award of punitive damages; the compensatory damage award was excessive and the product of passion and prejudice; the trial court

did not err in not assessing prejudgment interest; and the trial court did not err in awarding $4,000 in sanctions to Dr. Makley based upon a groundless complaint. Dr. Figgie's assignments of error should all be overruled, appellee should be awarded prejudgment interest, and the $4,000 sanction award requires reversal.

I.

The majority concludes that the record contains insufficient evidence to establish that Dr. Figgie's alleged conduct of altering Mrs. Moskovitz's medical records was characterized by either 1) hatred, ill will or a spirit of revenge, or 2) a conscious disregard for the appellee's rights and safety. In addition to these elements as set forth in *Preston v. Murty* (1987), 32 Ohio St.3d 334, in order to prove actual malice, it is necessary to infer from conduct and surrounding circumstances. *Villella v. Waiken Motors, Inc.* (1989), 45 Ohio St.3d 37. Moreover, the purpose of punitive damages is to deter, set example and punish unbecoming conduct of a defendant. *Id.*, 36.

Mrs. Moskovitz was discharged from the hospital on August 4, 1986 after her first knee replacement surgery. Dr. Figgie agreed that there were no signs of a tumor or metastatic disease in Mrs. Moskovitz at this time.

Dr. Figgie was asked to explain a discrepancy in his records as to Mrs. Moskovitz's visit with him on September 21, 1987. The record for the visit which was obtained from Dr. Figgie sets forth that:

> "Mrs. Moskovitz comes in today for her evaluation on the radiographs reviewed with Dr. York.

He was not impressed that this was anything other than a benign problem, perhaps a fibroma.

"Harry E. Figgie, III, M.D./vp

"As she does not want excisional biopsy we will observe." However, the same record which was obtained from the radiation therapy department at the hospital reveals that the statement, "We will, therefore, elect to continue to observe" was whited out in Dr. Figgie's record and replaced with the statement, "As she does not want excisional biopsy, we will observe."

The change in Mrs. Moskovitz's medical records occurred when Dr. Figgie requested that Dr. Makley return Mrs. Moskovitz's file to him in December, 1987. Dr. Figgie then altered the records to read that it was Mrs. Moskovitz who chose not to proceed with a biopsy of the mass as suggested by Dr. Figgie.

Dr. Figgie was extensively questioned on the accuracy of his medical records as they relate to when Mrs. Moskovitz brought the left leg mass to his attention, and his treatment of the leg mass. The jury was presented with the following pertinent testimony.

"Q. So did he [Dr. Makley] then get your records after November 10th, 1987?

"A. Mr. Kampinski, again, I cannot say whether he did or did not.

"Q. At some point you got them back, right, and when he requested them they were lost between December and January, December of '87 and January of '88, when his secretary asked for them from your secretary, they were missing, right, doctor?

"A. Mr. Kampinski, you actually – you asked me about three questions there. The first thing is you asked me if I gave Dr. Makley the records. The answer is no, I do not get involved in the clerical responsibilities of handing off records, et cetera. That is done between the secretaries.

"The second thing is that you stated that the records went back and forth. I have no knowledge of whether they went back and forth. I do not get involved with that particular responsibility.

"The third thing is that yes, I became aware at some point that they was [sic] missing, that the original records were missing, and that is a fact.

"Q. You don't know where the originals are, do you, doctor?

"A. No, sir, I do not.

"Q. You didn't do anything with it, did you?

"A. No, sir, and I find the accusation or the innuendo offensive.

* * *

"Q. Doctor, who whited out the entry in the changed page seven? Who did that, sir?

"A. I have no idea, Mr. Kampinski.

"Q. You don't?

"A. No, sir, I do not.

* * *

"A. Sir, that was originally typed. I cannot swear that that was my original dictation.

All I can say is that I did, I absolutely, I went back and looked at that. I reviewed that record, and that record did not reflect accurately the discussion.

"And I am allowed, as anybody who makes a mistake, to amend it. And I amended it appropriately. I put a line through it so anybody could come back and read and see exactly what was there, but that my note was in there clearly so that I had an understanding of the amendment that was there, so that I understood exactly what went on at that time.

"Q. Well, what you sent me didn't have that sentence in there, did it, doctor?

* * *

"A. * * * There's a record there, there's no question about it. I put a line through it because it did not reflect accurately what I said.

"There is another record there where that same area is whited out and there's absolutely no question about that. I do not make any efforts to deny that or anything. It is clearly there.

"Q. Well, doctor, if you don't understand the question that I ask, I'll rephrase it, but when I ask a question, I really would appreciate an answer to it.

"Did you or didn't you when you gave me your records at your deposition give me the version that didn't have the sentence in it?

"A. Yes, sir, that's true, and I told you that."

Plaintiff's counsel then read a portion of Dr. Figgie's secretary's deposition:

"Q. 'Were you ever asked to change or add to any of your notes?

" 'Question: By anybody, on Mrs. Moskovitz's notes?

" 'Answer: To change a note?

" 'Question: Yes.

" 'Answer: Never.

"I take it, therefore, that you never did?

" 'Never. You mean to pink out or white out something?

" 'Question: Yes.

" 'Answer: Never.' "

and proceeded to question Dr. Figgie as follows:

"Were you aware of that testimony?

"A. No, sir, I'm not. I've just heard this now, sir. I did not review my secretary's deposition.

"Q. Well, *she testified then that she never whited anything out?*

"A. *That's right.*

"Q. *You testified you didn't?*

"A. *Yes, sir.*

"Q. *Who did?*

"A. I don't know, sir. *The fact, sir, is that it has been whited out, and I don't know who did."* **(Emphasis added.)**

Dr. Figgie's secretary's telephone notes were altered to coincide with the record's amendment. The jury heard the following testimony of Dr. Figgie on the subject of his secretary's notebooks.

"Q. Doctor, the entries that were referred to by Mr. Jackson, a refusal to workup, refusal to biopsy, what do they say?

"A. Mr. Kampinski, I wish you'd talk about specific ones. They're [sic] a lot of entries regarding Mrs. Moskovitz in my phone book because she called frequently.

"Q. The two or three that say, 'Refuse to workup or biopsy as it pertains to the left tendoAchilles.' Those are the ones I'm referring to. Those are in pencil, are they not?

* * *

"A. This is the January 30th date.

"Q. Of 1987?

"A. 1987.

"Okay. And my note states, 'Called Friday.' It says – my secretary notes in her writing in ink Moskovitz's phone number, 382-1622, 'Pain, ankle.' My response in pencil, 'Called Friday. Refused workup, X-ray, see her.'

* * *

"A. I believe I saw the patient, sir. I'd like to refer to my notes. I saw the patient on –

"Q. February 2nd.

"A. February 2nd of '87, and I will read my note. 'Mrs. Moskovitz comes in today with complaint of bilateral knee pain as well as right ankle pain.'

"Q. So that was a complaint of pain in the right ankle, right?

"A. Yes.

* * *

"Q. Okay. The next entry then regarding refusal to work her up was when, doctor? What's the date of that?

"A. That's, from the book is 2-26.

"Q. February 26?

"A. Yes.

"Q. What's it say?

"A. This is a note taken by my secretary.

* * *

"A. The entry reads, 'Moskovitz, right foot, coming in today.' And that's on 2-26.

"Q. She didn't come in February 26, did she?

"A. No, she did not.

"Q. All right. Go ahead. Finish the entry, doctor.

"A. And I said, 'Patient seen, refuses workup, left foot, workup left foot.'

"Q. Doctor, she was in February 23rd, wasn't she?

"A. Yes, she was.

"Q. And it says, 'With respect to her left tendoAchilles, the swelling in the calcified region has maximized. It is now appearing to subside. It is not a problem. She still maintains active motion there and the symptoms are diminishing.'

"That's what you dictated based on your examination of February 23 with respect to the left tendoAchilles?

"A. That is true.

"Q. *Does it say anything there about recognizing a tumor?*

"A. *No, it does not.*

"Q. *Does it say anything about refusing a workup?*

"A. *No, it does not.*

"Q. In fact, it says it's pretty benign, doesn't it? It doesn't seem to be any problem, at all?

* * *

"Q. Well, doctor, if she had refused to have the biopsy up here and you had recommended it, I assume you recommended it again on May 7th?

* * *

"Q. It's a May 5th entry, isn't it, doctor?

* * *

"Q. Okay. Why don't you read the note to the jury.

"A. **'Mrs. Moskovitz, left leg real bad, lot of pain, swollen, appointment Thursday, 10 a.m.' And my note there says, 'Still refusing workup, biopsy,' et cetera.**

"Q. That's in pencil?

"A. Yes, sir.

* * *

"Q. Whose writing is that?

"A. That's my writing, sir. And it says, 'Agreed to workup. See her.'

"Q. Okay. That was September 11th?

"A. Yes, sir.

"Q. Okay. And you had her go for an X-ray?

"A. I had her come in to see me, sir.

"Q. I see. Then you sent her for an X-ray?

"A. Yes.

"Q. September 21st, 1987?

"A. That's what my notes say, sir." (Emphasis added.)

Dr. Figgie was then asked to once again refer to his medical records which contained the whited out statement.

"Q. Read the September 21st entry.

"A. Fine. 'Mrs. Moskovitz comes in today for evaluation of the radiographs reviewed with Dr. York. He was not impressed that this was anything other than a benign problem, perhaps a fibroma.' I then have a line through it, it's in my handwriting, 'We will, therefore, elect to continue to observe.'

"I have a line through that, and I continue and I write below it, 'As she does not want excisional biopsy, we will observe.'

"Q. *This is directly contradictory to the September 11th note that you just read to this jury in your secretary's notebook saying that she agrees to workup, directly contradictory, isn't it, doctor?*

"A. *Absolutely, sir.*" (Emphasis added.)

It was also approximately at this time that Mrs. Moskovitz's medical chart disappeared and neither Dr. Figgie nor any other treating physician could account for it. Dr. Figgie acknowledged that the maintenance of Mrs. Moskovitz's medical records was part of her medical treatment rendered by him.

Dr. Figgie, who was a member of the medical records committee at University Hospitals from 1985 to 1987, testified that, *"Removal in terms of to deface or to specifically alter [medical records] is absolutely forbidden."* (Emphasis added.) *He also testified that the alteration of medical records exhibits a flagrant disregard for the rights and safety of others.* Dr. Figgie *denied ever whiting out the statement* in his records *and could not explain how the statement was whited out,* although he admitted to amending the record to reflect his discussion with Mrs. Moskovitz and drawing a line through the inaccurate information.

An award of punitive damages is within the discretion of the finder of fact. The award will not be overturned unless it bears no rational relationship or is grossly disproportionate to the award of compensatory damages. *Shore, Shirley & Co. v. Kelly* (1988), 40 Ohio App.3d 10, 16; *Alessio v. Hamilton* (1985), 21 Ohio App.3d 247, 248. An appellate court will only reduce an award where there is evidence that passion or prejudice influenced the award. *Villella, supra,* paragraph one of the

syllabus. *A trial court is in the best position to determine whether an award for punitive damages is so excessive it supports a conclusion that the jury was wrongly influenced in its decision. Id.*, 40.

The record in the case *sub judice* reveals sufficient evidence to support ill will, hatred or a spirit of revenge on the part of Dr. Figgie. Testimony at trial disclosed that Mrs. Moskovitz never questioned her doctor's advice. Yet the altered records squarely placed the blame for the delay in treating her cancer on Mrs. Moskovitz. The records were altered approximately two months after the visit in question and at a time when Dr. Figgie was not her primary physician. The motivation behind Dr. Figgie's alteration of the medical records at this time creates suspicion. It is not unreasonable to infer that the alteration was an attempt to prevent Mrs. Moskovitz's new physicians from discovering and questioning Dr. Figgie's misdiagnosis of her cancer. It was an easier solution for Dr. Figgie to blame Mrs. Moskovitz. Furthermore, the nearly simultaneous loss of biopsy slides and Dr. Figgie's chart is too coincidental for comfort. A physician's number one priority is the care of the patient. The scramble to blame Mrs. Moskovitz for her dilemma is nothing but ill will.

In addition, there was sufficient evidence presented by plaintiff to support a finding that Dr. Figgie acted with conscious disregard for the rights and safety of Mrs. Moskovitz. Dr. Figgie, by his own testimony, *admitted that one who alters medical records acts under a conscious disregard for another's rights and safety.* The alteration of medical records not only harms a patient's current treatment but also potentially harms future treatment as a result of

an inaccurate record. An accurate medical record is a necessity. Dr. Figgie's plea that no person was actually harmed by the altered records and, therefore, there is no actual malice, does not sway my opinion. The legal definition of actual malice does not include the element of actual harm. All that is required under *Preston, supra,* is the great probability of substantial harm. The great probability of substantial harm is clearly present here since medical records are an integral component of any patient's care.

The majority encourages and condones a physician's intentional alteration of medical records to infer that a patient ultimately caused his or her own eventual death. The majority's failure to acknowledge a physician's intentional alteration of medical records to infer that a patient ultimately caused his or her own eventual death as a dangerous and malicious act is disturbing to me. *The accuracy of Dr. Figgie's medical records was subject to extreme doubt and the inconsistencies found therein were poorly explained by him.* The *jury* was thus presented with sufficient evidence from which *it* could infer from conduct and surrounding circumstances that Dr. Figgie acted with actual malice. The trial court was in the best position to determine the appropriateness of the punitive damages award. Its decision was sound and should not have been tampered with by the majority.

II.

The majority finds that Mrs. Moskovitz's pain and suffering does not warrant a $2 million survivorship

award. Moreover, the majority concludes that the wrongful death award is so excessive it appears to have been the result of passion or prejudice.

The jury awarded over $3 million for compensatory damages to plaintiff. Dr. Figgie contends that, "[t]he jury must have taken into account Plaintiff's punitive damage claim and Mrs. Moskovitz's Nazi concentration camp experience and inflated the damages to 'compensate' Mr. and Mrs. Moskovitz for being part of a tragedy that took place forty years ago and which had *no* bearing on Dr. Figgie's care of Mrs. Moskovitz." (Emphasis in original.) He thus argues that the award was excessive and a product of passion and prejudice and requires a vacating of the award in both the survival and wrongful death actions and a remand of the action for a new trial.

Mr. Moskovitz related a brief history of his life and that of his wife, and then spoke of the first removal of a lump from Mrs. Moskovitz's leg in 1978. A second lump was removed in 1984. Both were benign. In 1985, she was referred to Dr. Figgie as a result of knee problems. Mr. Moskovitz could not accurately recall the date on which his wife presented the left tendon mass to Dr. Figgie. He, however, recalled that Dr. Figgie told Mrs. Moskovitz, "Don't worry, Margaret. This is nothing. This is tendons, tendons." When asked if Dr. Figgie ever told them that the mass could be cancerous, Mr. Moskovitz responded, "Never told us it could be cancerous, never." Mr. Moskovitz further responded, "No" when asked if Dr. Figgie ever suggested a biopsy. He maintained that Mrs. Moskovitz would do everything Dr. Figgie told her to do and expressed that Mrs. Moskovitz fully trusted Dr. Figgie.

Mrs. Moskovitz's cancer was ultimately diagnosed in late 1987. Mrs. Moskovitz asked Dr. Figgie why he let her go so long with the tumor when she learned of the tumor's malignancy. Numerous radiation therapy treatments from November through January of the following year yielded no positive results. Dr. Makley removed Mrs. Moskovitz's left leg on February 2, 1988. Mr. Moskovitz testified that Dr. Figgie told them the purpose of the amputation was so "[i]t wouldn't spread somewhere else."

Mrs. Moskovitz's husband and children testified about the ill effects of the amputation and of Mrs. Moskovitz's inability to care for herself to the extent she could prior to the amputation. She no longer slept in her upstairs bedroom, resorting to sleeping on the hide-a-bed. Mr. Moskovitz and one of his sons stayed in the living room to attend to Mrs. Moskovitz; Mr. Moskovitz described the situation as a "very hard time for us." Mrs. Moskovitz could not take a bath; she had to wash herself with a washcloth. She would have to be carried from the wheelchair whenever she was taken to and from the hospital which was a difficult task since she only had the one leg.

Mrs. Moskovitz suffered a hip fracture when travelling to the hospital to be fitted for a prosthesis. The cancer had eaten through her bone. Chemotherapy treatments were the next course of action when Mrs. Moskovitz became a patient at Hillcrest Hospital after the fracture. Mrs. Moskovitz was a patient at that hospital a total of eleven times between May, 1988 and her death on December 5, 1988.

This court's duty is not to set aside a verdict based on our opinion, but to determine whether the damages awarded are so high that substantial justice would be denied if we were to allow the verdict to stand. *Hancock v. Norfolk & Western Rd. Co.* (1987), 39 Ohio App.3d 77, 85. The record herein fails to indicate that the jury was wrongfully influenced in its award. In the absence of such influence, neither this court nor the trial court could substitute its judgment for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42. Further, when competent, credible and substantial evidence supports the verdict, the granting of a new trial is an abuse of discretion. *Hancock, supra.*

The obvious conclusion in this case as recognized by the majority is that the bulk of the $2 million award on the survivorship claim was for pain and suffering. Mrs. Moskovitz's family and her medical records detail a thirteen month period of extreme suffering. Under the circumstances, I refuse to say that the verdict is against the weight of the evidence or that the jury was influenced by passion or prejudice. See, *Gilbert v. Dixon* (Mar. 29, 1990), Cuyahoga App. No. 56788, unreported.

The jury also awarded $1,250,000 on the wrongful death claim. A jury's verdict on a wrongful death action will likewise generally not be set aside unless it is so excessive that it is obvious it is a result of passion or prejudice. *Jones v. Wittenberg University* (1976), 534 F.2d 1203; *Dawson v. Cleveland Metropolitan General Hospital* (Nov. 20, 1986), Cuyahoga App. Nos. 51052, 51779, unreported.

R.C. 2125.02(B) sets forth that compensatory damages may be awarded in an action for wrongful death. Damages may include:

> "(1) Loss of support from the reasonably expected earning capacity of the decedent;
>
> "(2) Loss of services of the decedent;
>
> "(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;
>
> "(4) Loss of prospective inheritance, to the decedent's heirs at law at the time of his death;
>
> "(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin."

R.C. 2125.02(B)(1)-(5).

The majority refers to Mrs. Moskovitz's frail condition in justifying its pronouncement that the wrongful death award was too excessive. I am appalled by this simplistic and insensitive reasoning, that since Mrs. Moskovitz was sickly, the award was too excessive. Mrs. Moskovitz may have had physical ailments but she was neither an amputee, dead, nor dying when Dr. Figgie failed to adequately diagnose and then treat the cancer.

When asked by plaintiff's counsel if he had an opinion, to a reasonable degree of medical certainty, whether Mrs. Moskovitz would probably be alive and disease free today if Dr. Figgie had adhered to the appropriate standard of care required of him, Dr. Engleberg responded,

"yes." According to the doctor, Mrs. Moskovitz would be alive and well.

The majority also refers to the economic loss as estimated by appellee's economist in support of its conclusion. However, as delineated *supra,* an individual's earning capacity is not the only factor to be considered when determining an award in a wrongful death action. *The majority totally and in my opinion inappropriately disregards the remaining factors to be considered in ascertaining these damages.*

The record reveals that Mr. Moskovitz and Mrs. Robinson, Mrs. Moskovitz's daughter, lost all pleasure from life after the death of Mrs. Moskovitz who was referred to as the backbone of the family. Her life experiences would never enrich another member of her growing family.

Since Mrs. Moskovitz's death, Mr. Moskovitz is "very depressed." He cannot sleep. He always thinks of his wife. He receives no enjoyment from his grandchildren as he always thinks of the enjoyment Mrs. Moskovitz's could have had from them if she were still alive. Mr. Moskovitz testified that he feels like a "dead person."

Mrs. Robinson's testimony followed that of her father. She also testified about her mother's caring and devoted nature to her and her brothers and how her mother loved them with "her whole soul." This caring and friendly nature flowed to everyone that met Mrs. Moskovitz.

When Mrs. Moskovitz ultimately had the leg removed in February, 1988, Mrs. Robinson stayed with

her mother. The occurrence was a very traumatic experience; she never saw her mother so distraught.

Mrs. Robinson then described the effect her mother's death had on the family. Her father and brothers are extremely depressed as they live in Mrs. Moskovitz's home which is filled with memories of her. It breaks Mrs. Robinson's heart whenever she speaks with her father or brothers. According to her, Mrs. Moskovitz was the liveliest one, the emotional support and backbone of the family. Mrs. Robinson stated that she now has a very hard time receiving any pleasure from life. Mrs. Moskovitz's life experiences would never enrich another member of her growing family. The loss of Mrs. Moskovitz to her next of kin on the wrongful death claim was substantiated and warranted by the evidence.

Dr. Figgie's next argument, which was not commented on by the majority, was that the jury was unduly influenced by plaintiff's reference to Mrs. Moskovitz's time in the German concentration camps. At no time did defense counsel object to any testimony with regard to Mrs. Moskovitz's concentration camp experience. The Ohio Supreme Court has held as follows:

> **"An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State v. Glaros*, 170 Ohio St. 471, approved and followed.)"**

State v. Williams (1977), 51 Ohio St.2d 112, paragraph one of the syllabus. Since Dr. Figgie failed to raise his objections to the trial court relative to concentration camp testimony, he cannot now argue that the testimony resulted in passion and prejudice which influenced the jury.

Assuming arguendo that Dr. Figgie did so object, the testimony drawn out by plaintiff's counsel did not rise to the level of creating passion or prejudice. This testimony outlined Mrs. Moskovitz's life, her strengths and weaknesses, her personality, and the affect she had on members of her family.

During plaintiff's opening statement, counsel stated:

> "Going back to the early '70s and since apparently her time in the concentration camps, she suffered from an extremely severe depression, and that carried with her until her death unfortunately."

Plaintiff's counsel later in trial questioned Mr. Moskovitz about his wife's life as follows:

"Q. Had she been in the concentration camps before you met her?

"A. We came together.

"Q. No, I mean, during the war, was she in the concentration camp?

"A. She was in the concentration camp, yes.

"Q. Do you know which ones?

"A. Old Switz [sic] [Auschwitz], others. I don't remember exactly.

"Q. Okay.

"A. She came Old Switz [sic] [Auschwitz]. They moved to Bomberg and others. She was a selected girl which could work and which they alternated people to put in, come in the gas chambers. They killed – the chambers killed a lot of people.

"Q. Margaret survived the camps?

"A. She survived the Holocaust."

This testimony was harmless in that it was only a general description. It was only when defense counsel cross-examined Mr. Moskovitz that more specifics were brought to the jury's attention by focusing on Mrs. Moskovitz's pain and suffering.

"Q. Your wife lost most of her family in these concentration camps, did she not?

"A. Yes.

"Q. And as a result of that she suffered some very serious emotional problems that she received treatment from that time and until her death; isn't that true?

"A. Depression.

"Q. I'm sorry?

"A. Depression.

"Q. She had a very severe depression, did she not?

"A. Yes, she took medicine."

Dr. Figgie called Dr. Ashenberg to testify about Mrs. Moskovitz's condition and the pain she experienced as a

result. Dr. Ashenberg thus testified by, in part, referring to his notes:

"A. * * *

" 'In response to specific questions about her knee problem, Mrs. Moskovitz would frequently go on tangents describing in detail her concentration camp experience.'

* * *

"Q. Why did she call you in August of 1987?

"A. Mrs. Moskovitz called me to ask me if I would consider writing a letter for her to the German consulate.

"Q. Did she explain why she needed the letter?

"A. Mrs. Moskovitz was receiving reparations as a concentration camp survivor. And she was hoping to get an increase in her stipend, and she asked me if I would write a letter to the German consulate discussing her current situation and to see if that would help her get an increased stipend. I agreed to do that.

"Q. And did you write that letter?

"A. Yes, I did.

* * *

"Q. In the middle of this letter to the German consulate I'd like you to, if you would, read beginning here and then explain how you perceived Mrs. Moskovitz's decision to not continue with therapy?

"A. 'In addition she has chronic anxiety and depression and reports having some flashbacks to her concentration experience. Her level of emotional distress makes it virtually impossible for Mrs. Moskovitz to benefit from any type of chronic pain management, thus, Mrs. Moskovitz is caught in a vicious cycle.

" 'Her physical conditions is [sic] greatly exacerbating her post-traumatic stress disorders from her concentration camp experience and this emotional distress makes it difficult for any psychological intervention to help her cope with her physical condition.

" 'In my opinion Mrs. Moskovitz's post-traumatic stress disorder has directly affected her ability to recover from her many medical problems.' "

Q. Stop there. Doctor, are you familiar with the term called learned helplessness?

"A. Yes, I am.

"Q. Could you please tell the ladies and gentlemen of the jury what that is and how it applies to Margaret Moskovitz?

"A. In general, learned helplessness is a phenomenon that you often see in people. Sometimes you can see it in animals who have undergone vicious treatment at some point in their lives.

"The treatment was vicious, it was brutal and it was not escapable. They often tried to escape from these situations, but the escape at each point is punished.

> "Learned helplessness means that when these people are put in a new situation in which they might also be experiencing pain, discomfort, punishment and they do have an opportunity to escape to do something about it, they just don't see that option anymore, they feel helpless, so no matter what situation you put that person in, when they feel victimized, they're likely not to be able to see any escape routes.

"Q. Did you feel that Margaret Moskovitz suffered from learned helplessness?

"A. Yes, I did.

"Q. Is that reflected in the corroboration that you noticed in her experience in your first initial evaluation in the –

"A. In part, yes, it was.

"Q. And is that also what you're reflecting in the letter to the German consulate?

"A. Yes, that's correct."

Dr. Figgie intended to call Dr. Ashenberg as a witness as defense counsel stated in opening statement:

* * *

> "And you'll hear from Dr. Ashenberg about what he did for her and the problems that this lady was having. * * * "

In light of Dr. Figgie's failure to object to plaintiff's testimony and of Dr. Ashenberg's testimony, I am not convinced that Dr. Figgie only introduced evidence of Mrs. Moskovitz's concentration camp experience because

of plaintiff's introduction of it. Dr. Figgie is, therefore, precluded from complaining of the introduction of this evidence. He used the same information to portray Mrs. Moskovitz as suffering from psychological disorders which caused her to be unable to withstand and heal her own illness. It was Dr. Figgie who introduced into evidence letters written at the request of Mrs. Moskovitz for the purpose of seeking an increase in her stipend. Dr. Figgie's accusation that plaintiffs unduly stressed Mrs. Moskovitz's concentration camp experience will not be accepted owing to his own use of the concentration camp experience to benefit his cause. If it so happened that the evidence used by Dr. Figgie backfired by creating passion or prejudice, which I expressly find no evidence of, he cannot retrospectively argue that this evidence was impermissible.

III.

Appellee challenges the trial court's denial of prejudgment interest in his cross-appeal. The majority finds that Dr. Figgie was not obligated to make a monetary settlement offer because he possessed a good faith, objectively reasonable belief that he was not liable.

Dr. Figgie made no settlement offer to plaintiff during the course of the action. He asserts that he was under no obligation to make an offer as he had a good faith, objectively reasonable belief that there was no liability. He bases this assertion on the expert opinion of Dr. Simon. Dr. Figgie argues that the plaintiff is thus not entitled to prejudgment interest.

Dr. Figgie, when confronted with plaintiff's complaint, sought a resolution of the matter through statutory arbitration. The arbitration panel *unanimously* found for the plaintiff with one dissenting arbitrator opining that *plaintiff deserved a greater monetary award.*

Dr. Figgie's records indicate that Mrs. Moskovitz visited him in October, 1986 with a mass which was not specifically identified as to location. Dr. Figgie expressly remembered that the mass was on the right leg. *Hospital reports which were signed by Dr. Figgie in November, 1986, disclose that Mrs. Moskovitz did have a mass on her left leg in at least that month. Dr. Figgie nevertheless insisted throughout the proceedings that Mrs. Moskovitz first presented him with a mass on her left leg in February, 1987.*

Dr. Engleberg opined that Mrs. Moskovitz first informed Dr. Figgie of a mass on her left tendoAchilles on October 2, 1986. Although Dr. Figgie's medical records refer to a mass on the tendoAchilles without an indication that it was located on her right or left leg, Dr. Engleberg maintained that it had to be the mass on her left leg. He reasoned that any mass with the potential of malignancy should be accurately described in a medical report. Moreover, subsequent medical records only referred to a mass on the left leg rather than the right leg of the patient. Dr. Engleberg, therefore, concluded that " * * * the mass that he [Dr. Figgie] was referring to on October 2, 1986 was on the left leg."

This factual dispute alone casts doubt on Dr. Figgie's "good faith, objectively reasonable belief" that he was not liable for Mrs. Moskovitz's injuries. Moreover, more

doubt is cast by Dr. Figgie's alteration of the medical records.

It is true that Dr. Simon supported Dr. Figgie's defense. He identified what he believed to be metastases in various x-rays taken of Mrs. Moskovitz in 1986. He concluded that Mrs. Moskovitz's cancer metastasized prior to October, 1986 and that any diagnosis and treatment rendered by Dr. Figgie at that point would not have arrested the progress of the disease or prevented eventual death. Dr. Simon's opinion was challenged by the reports of the radiologists who read the x-rays at issue in 1986 and in 1987. The radiologists detected no metastases in the x-rays although one in retrospect identified a suspicious lesion in Mrs. Moskovitz's spleen in July, 1986.

The valid issue of whether Mrs. Moskovitz's tumor metastasized prior to October, 1986 was presented to the jury. The jury concluded that metastases would have been prevented if Dr. Figgie timely treated the mass in Mrs. Moskovitz's left leg which it found was presented to him in October, 1986. This conclusion formed the basis for the multi-million dollar verdict in favor of the plaintiff.

Poor predictive ability does not *necessarily* establish a party's failure to make a good faith settlement offer. *Black v. Bell* (1984), 20 Ohio App.3d 84, 88. However, the discrepancy between the jury's verdict and Dr. Figgie's total lack of settlement offer in light of the conflicting evidence presented by both parties leads me to conclude that Dr. Figgie failed to rationally evaluate his potential liability and failed to make a good faith settlement offer.

Dr. Figgie attempts to avoid this conclusion by asserting that plaintiff lacked good faith in settlement

negotiations. Plaintiff was required to make a good faith effort to settle the case in order for there to be an award of prejudgment interest. *Id.*, paragraph one of the syllabus. Dr. Figgie focuses on plaintiff's counsel's devotion to ferret out the maximum payment from Dr. Figgie's insurance carrier as evidence of bad faith. Counsel's attempt to ascertain insurance information allowed him to formulate either a settlement offer or a prayer for plaintiff's complaint. Plaintiff's counsel at least attempted to settle the case but was confronted with a brick wall. *Dr. Figgie's outright refusal to participate in the negotiations in light of the discrepancies in the evidence* buttresses my conclusion that the trial court improperly denied plaintiff's motion for prejudgment interest. Competent evidence in the record does not support the determination that Dr. Figgie rationally evaluated his liability and was thus justified in his refusal to participate in settlement negotiations.

IV.

The majority concludes that the failure of appellee's attorney, Mr. Kampinski, to present required expert testimony justified the trial court's award of Civ.R. 11 sanctions in the amount of $4,000.

Plaintiff's allegations against Dr. Makley were that he unnecessarily amputated Mrs. Moskovitz's left leg and that he informed her that the purpose of the amputation was to cure her cancer rather than ease her pain. Absent any expert testimony against Dr. Makley, plaintiff could not establish a *prima facie* case of medical malpractice. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127.

Dr. Engleberg, in his deposition, stated that he was unsure of whether Dr. Makley deviated from an acceptable standard of care. He proffered that a jury would be in a better position to decide the main issue: was Mrs. Moskovitz aware that the amputation was for palliative, i.e., pain reduction, purposes or was she under the impression that the amputation was for curative purposes. When asked whether his testimony would include the opinion that Dr. Makley deviated from the accepted standard of care in the treatment of Mrs. Moskovitz, Dr. Engleberg responded:

> "I will state that if, in fact, the patient was told that the procedure was done in order to cure her or if, in fact, the patient was not shown to have had a lot of suffering and pain in that leg, then I would say Dr. Makley deviated from the standard of care."

He further testified that:

> "If the patient understood that there was no chance of cure by having her leg amputated and wanted it done anyway because she had severe intractable pain and that can be demonstrated, then I would not say his care deviated from the standard of care.
>
> "If on the other hand, it cannot be demonstrated that she was having severe and intractable pain in that leg and the patient did not fully understand that the procedure was not of a curative intent, then I will say he deviated from the standard of care.
>
> "I think the jury should be more able to determine which of those sets of facts, which of those scenarios would most closely reflect reality."

Dr. Engleberg found no evidence in the records provided to him by plaintiff's counsel that Mrs. Moskovitz had intractable pain and that she had given full conformed consent. He testified that,

> "[t]here is nothing there to document, to my satisfaction, that she had intractable pain and that undergoing this procedure she understood, well, that even though it wasn't going to cure it, it might help her pain.
>
> * * *
>
> "If I were going to cut somebody's leg off, I would certainly make it very clear in the records that the patient had intractable pain and that the patient understood that his procedure was purely a palliative, potential palliative benefit. It wasn't going to cure her.
>
> * * *
>
> "The reasonable and prudent physician undertaking an extreme procedure as amputation, the reasonable and prudent physician would well document that in bright red letters in the chart: The patient understood it wasn't for cure and that she had been suffering pain.
>
> "And he would probably have gotten another consultation from a neurologist or pain expert or somebody else in the field to corroborate this was the only alternative because that is an extreme alternative. * * * "

Dr. Engleberg, however, offered to keep an open mind and requested that further data be provided him, if it existed, to change his opinion. He was "willing to be enlightened" with evidence that Mrs. Moskovitz had intractable pain and understood the amputation was for

palliative purposes. Dr. Makley asserts that plaintiff's failure to forward additional documents to Dr. Engleberg precluded the use of Dr. Engleberg as an expert witness against Dr. Makley. Therefore, when Mr. Kampinski filed the amended complaint against Dr. Makley even after the arbitration panel found in favor of the doctor, Dr. Makley argues that the complaint was filed without foundation and in bad faith.

The majority fails to recognize that the issue of whether Mrs. Moskovitz was in intractable pain or whether she understood the amputation to be for palliative rather than curative purposes is an issue that Dr. Engleberg expressly stated was best left to the jury. Even though Dr. Engleberg kept an "open mind" and reserved his opinion on the issue, his deposition provided sufficient evidence for Mr. Kampinski to fashion a complaint in medical malpractice.

Moreover, the depositions of Mr. Moskovitz and Mrs. Robinson supported the position that Mrs. Moskovitz believed that the amputation was for curative purposes. Mr. Moskovitz testified that he and his wife were never told that the cancer had spread and that the reason for the amputation was to keep the cancer from spreading somewhere else. Mrs. Robinson was asked whether she knew why her mother was undergoing the amputation or whether her mother provided the reason for her. She responded that, " * * * she had to have the amputation so that it wouldn't spread anywhere else in her body, and this way she could save her life."

The record reveals sufficient evidence that Mrs. Moskovitz was unaware of the true purpose for the amputation of her leg. *Dr. Engleberg opined that if Mrs.*

Moskovitz believed that the purpose was curative rather than palliative, Dr. Makley's actions fell below the accepted standard of care.

Assuming arguendo that the trial court properly granted Dr. Makley's motion for sanctions, it surpassed and now the majority surpasses its authority in awarding $4,000 to Dr. Makley. The "appropriate action" to be taken when an attorney signs a groundless complaint referred to in Civ.R. 11 is first a reference to a disciplinary proceeding brought under the Rules for the Government of the Bar of the court. "A wilful violation of Rule 11 by an attorney may subject him to appropriate court *disciplinary* action." (Emphasis added.) Staff Notes to Civ.R. 11. In addition, sanctions may include an award of attorney's fees. *Mitchell v. Whitaker* (1986), 33 Ohio App.3d 170, 172; *Stevens v. Kiraly* (1985), 24 Ohio App.3d 211, 213-215. I stress, however, there is no legal justification for awarding Dr. Makley $1,000 per day for each day he attended the trial. It appears the majority is awarding Dr. Makley damages as if there were, *e.g.*, a counterclaim when there is only a motion for sanctions.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 60464, 61166

AARON MOSKOVITZ Plaintiff-appellee Cross-Appellant [Case No. 60464]	*NUNC PRO TUNC*
[Case No. 61166, appeal by: Charles Kampinski] -vs- MT. SINAI MEDICAL CENTER, ET AL. [Appeal by Harry E. Figgie, III, M.D.] Defendant-appellant Cross-Appellee [Case No. 60464]	JOURNAL ENTRY AND OPINION
DATE OF ANNOUNCEMENT OF DECISION	JUNE 14, 1993
CHARACTER OF PROCEEDING	Civil appeal from Court of Common Pleas Case No. 158691
JUDGMENT	AFFIRMED IN PART, REVERSED IN PART AND REMANDED.
DATE OF JOURNALIZATION	

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PATTON, P.J.

Sua sponte, this Court corrects its Journal Entry and Opinion and Dissenting Opinion of January 7, 1993.

The prior Journal Entry and Opinion and Dissenting Opinion of this Court released on January 7, 1993, contained the following errors:

The first sentence on the Dissenting Opinion cover page reads:

> I respectfully dissent from the majority's abbreviated resolution of appellant Dr. Figgie's first and fourth assignments of error, appellee's cross assignment of error, and appellant Mr. Kampinski's second, third and fourth assignments of error.

The corrected first sentence on the Dissenting Opinion cover page should read:

> I respectfully dissent from the majority's resolution of appellant Dr. Figgie's first and fourth assignments of error, appellee's cross assignment of error, and appellant Mr. Kampinski's second, third and fourth assignments of error.

The second paragraph on page 12 of the Dissenting Opinion reads:

> The majority encourages and condones a physician's intentional alteration of medical records to infer that a patient ultimately caused his or her own eventual death. The majority's failure to acknowledge a physician's intentional alteration of medical records to infer that a patient ultimately caused his or her own eventual death as a dangerous and malicious act is disturbing to me. *The accuracy of Dr. Figgie's*

> *medical records was subject to extreme doubt and the inconsistencies found therein were poorly explained by him.* The *jury* was thus presented with sufficient evidence from which *it* could infer from conduct and surrounding circumstances that Dr. Figgie acted with actual malice. The trial court was in the best position to determine the appropriateness of the punitive damages award. Its decision was sound and should not have been tampered with by the majority.

The corrected second paragraph on page 12 of the Dissenting Opinion should read:

> The majority encourages and condones a physician's intentional alteration of medical records. *The accuracy of Dr. Figgie's medical records was subject to extreme doubt and the inconsistencies found therein were poorly explained by him.* The majority inappropriately judges Dr. Figgie's credibility by accepting outright his denial of altering the medical records. If Dr. Figgie denies such alternation, he must not have, according to the majority, altered the records. The *jury* was presented with sufficient evidence from which *it* could infer from conduct and surrounding circumstances that Dr. Figgie acted with actual malice. The trial court was in the best position to determine the appropriateness of the punitive damages award. Its decision was sound and should not have been tampered with by the majority.

The first line of paragraph 3 on page 18 of the Dissenting Opinion reads:

> Dr. Figgie's next argument, which was not commented on by the majority, was that the jury was unduly influenced by plaintiff's reference

> to Mrs. Moskovitz's time in the German concentration camps.

The corrected first line of paragraph 3 on page 18 of the Dissenting Opinion should read:

> Dr. Figgie's next argument was that the jury was unduly influenced by plaintiff's reference to Mrs. Moskovitz's time in the German concentration camps.

All citations and quotations in the Journal Entry and Opinion and Dissenting Opinion are italicized herein instead of underscored to conform to the *Manual of Citations*, Interim Edition, July 1, 1992 of the Ohio Official Reports prepared by the Reporter's Office of The Supreme Court of Ohio.

IT IS ORDERED that said Journal Entry and Opinion and Dissenting Opinion of January 7, 1993, be amended nunc pro tunc to correct the errors on the cover page, page 12 and page 18 of the Dissenting Opinion and to change the citations and quotations from underscoring to italics as stated above.

IT IS FURTHER ORDERED that, as so amended, said Journal Entry and Opinion and Dissenting Opinion of January 7, 1993, shall stand in full force and effect as in all its particulars.

The corrected Journal Entry and Opinion and Dissenting Opinion are attached.

BLACKMON, J.
HARPER, J., CONCUR

/s/ John T. Patton
PRESIDING JUDGE
JOHN T. PATTON

IN THE COURT OF COMMON PLEAS
CASE NO. 158691
JUDGE JAMES J. McMONAGLE

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

AARON MOSKOVITZ, Executor of the Estate of MARGARET MOSKOVITZ, Deceased
Plaintiff
-vs-
HARRY E. FIGGIE, III, M.D.
Defendant

JUDGMENT ENTRY

The jury having returned the following verdicts in favor of the plaintiff and against the defendant, Harry E. Figgie, III, M.D. in the within case:

1. On the survivorship claim in the amount of Two Million Dollars ($2,000,000);

2. On the wrongful death claim in the amount of the One Million Two Hundred Fifty Thousand Dollars ($1,250,000), and further on the wrongful death claim in the amount of Five Thousand ($5,000) for reasonable funeral and burial expenses;

3. On the plaintiff's claims for punitive damages in the amount of Three Million Dollars ($3,000,000).

It is therefore ordered that judgment is hereby rendered in favor of the plaintiff against the defendant, Harry E. Figgie, III, M.D. on the plaintiff's surviership claim in the amount of Two Million Dollars ($2,000,000); on the plaintiff's wrongful death claim in the amount of One Million Two Hundred Fifty Thousand Dollars ($1,250,000) plus Five Thousand Dollars ($5,000) for reasonable funeral and burial expenses and on the punitive damage claim in the amount of Three Million Dollars ($3,000,000).

Costs to the defendant, Harry E. Figgie, III, M.D.

/s/ James J. McMonagle
JAMES J. MCcMONAGLE,
JUDGE

DATE: 12/27/89

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/s/ Illegible

IN THE COURT OF COMMON PLEAS
CASE NO. 158691
JUDGE JAMES J. McMONAGLE

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

MARGARET MOSKOVITZ, et al.
Plaintiff
-vs-
MT. SINAI MEDICAL CENTER, et al.
Defendants

JUDGMENT ENTRY
(Filed Aug. 2, 1990)

Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial concerning the compensatory damages is denied.

Defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial concerning the punitive damages is denied.

Plaintiffs' motion for pre-judgment interest is denied.

Pursuant to Civ. R. 62(B) a supersedeas bond equal to $7,000,000 is required. The form of the bond or collareral [sic] shall be subject to approval by this court. (See R. C. 2505.11)

/s/ James J. McMonagle
JAMES J. McMONAGLE, JUDGE

DATE: August 21, 1990

IN THE COURT OF COMMON PLEAS
CASE NO. 158691

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

AARON MOSKOVITZ, etc.)
Plaintiff)
vs.)
MT. SINAI MEDICAL CENTER, et al.,)
Defendants.)

RULING ON MOTION OF DEFENDANT JOHN MAKLEY, M.D. FOR CIVIL RULE 11 SANCTIONS

LINDA ROCKER SOGG, J.:

This cause came before the Court on the motion of defendant John Makley, M.D. seeking Civil Rule 11 sanctions against plaintiff's attorney. A hearing was held in open court on November 28, 1990, and based on the record, the evidence adduced at hearing and the supplemental materials filed by the parties, the Court finds defendant's motion to be well taken and grants judgment in his favor.

On November 8, 1988, plaintiff filed an amended complaint alleging that several defendants, including John Makley, M.D., committed medical malpractice and wrongfully caused the death of plaintiff's decedent, Margaret Moskovitz. A medical malpractice arbitration hearing was subsequently held, and on December 7, 1989, the panel found in Dr. Makley's favor and in its opinion held in relevant part as follows:

> Dr. John Makley's medical care of Margaret Moskovitz did not fall below medical standards for treatment of her disease.
>
> * * *
>
> . . . there was insufficient evidence to find Dr. Makley deviated from acceptable standards of care.

Defendants other than Dr. Makley filed a notice of nonacceptance of the arbitrators' award and plaintiff filed a similar notice as to defendant John Makley, M.D. The case proceeded to a trial *de novo* commencing on December 11, 1989. During the period following the arbitration and prior to trial, a second expert retained by plaintiffs testified at deposition that Dr. Makley did not deviate from accepted standards of care. At trial, plaintiff's lead expert witness, Charles Engleberg, M.D., failed to provide *any* testimony establishing that Dr. Makley's treatment of plaintiff's decedent deviated from the accepted standards of care. After plaintiff rested his case-in-chief, the trial court granted Dr. Makley's motion for a directed verdict.

> THE COURT: I find that there is no evidence of any nature or kind, whatsoever, that Dr. Makley deviated from any accepted standard of care, and the motion regarding Dr. Makley is granted, and, therefore, the matter is dismissed with regard to him.
>
> (Trial Transcript 70-72)

Civil Rule 11 provides in part as follows:

> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated.

* * *

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney may be subjected to *appropriate action*. . . . (Emphasis added.)

The purpose of Civ. R. 11 is to ensure that a pleading is filed in good faith with adequate grounds to support it. *Stevens v. Kiraly* (1985), 24 Ohio App. 3d 211. A trial court's decision regarding the imposition of sanctions will not be reversed absent an abuse of discretion. *State, ex rel. Fant v. Sykes* (1987), 29 Ohio St. 3d 65. See, *Bethke v. Baker Motors, et al.* (August 23, 1990), Cuyahoga App. No. 58258, unreported.

This Court is mindful of the heavy burden facing a plaintiff's attorney pursuing a medical malpractice case – i.e., the volume of records to be obtained and reviewed, the amount of preparatory investigation, and the involvement of numerous health care providers and insurers. In many cases, despite diligent efforts to "narrow the field" of possible defendants, a complaint must be filed which names every doctor and hospital having rendered care or treatment to a plaintiff. However, the Court's tolerance for what has been called "shotgun" pleading wanes as a case progresses and disappears entirely when it becomes clear that there is insufficient evidence to hold a defendant in a lawsuit. Public policy will not allow plaintiffs to force the continued participation of doctors and hospitals in lawsuits where there is no demonstrable evidence of

wrongdoing on their part. The expenses incurred by providers translates into higher medical costs to the public at large and serves no beneficial purpose.

In the instant case, it was obvious, following the conclusion of the medical malpractice arbitration, that no credible evidence existed that would establish that Dr. John Makley was negligent in his treatment of plaintiff's decedent. Nevertheless, plaintiff's counsel filed a notice of non-acceptance of the arbitrator's award as to Dr. Makley. Moreover, despite further confirmation of this fact, plaintiff's counsel proceeded to trial against Makley, requiring him to be present and to cancel appointments and surgeries. After four days of trial, the Court dismissed the case against Dr. Makley because of the that [sic] absence of evidence against him.

> The purpose of the rule [Civ. R. 11] then is to deter pleading and motion abuses; it is to assure the court that the pleading or motion was filed in good faith with sufficient grounds to support it. If a court determines that a pleading or motion was filed to defeat this purpose, it may strike the document. But it may also punish the attorney who signed it and thereby certified it as true. *Stevens v. Kiraly* (1985), 24 Ohio App. 3d 211, 213.

In light of the foregoing, this Court finds that plaintiff's counsel. Charles Kampinski, acted to defeat the purpose of Civil Rule 11 by persisting in a meritless claim against Dr. Makley. Because Ohio law permits a court to tailor Civil Rule 11 sanctions to fit the case before it, this Court hereby awards sanctions against plaintiff's counsel to be computed on the basis of Dr. Makley's lost income

from his medical practice on those dates when Dr. Makley attended the trial under subpoena by plaintiff's counsel and prior to his dismissal on his motion for a directed verdict.

Therefore, for the trial dates of December 11, 1989, December 12, 1989, December 13, 1989, and December 14, 1989, the Court hereby awards sanctions in favor of John Makley, M.D., and against Charles Kampinski, Esq., in the amount of $1,000.00 per day, or $4,000.00.

IT IS SO ORDERED.

LINDA ROCKER SOGG, JUDGE

DATE: December ____, 1990

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GERALD E. EUERST, CLERK DEP
BY /s/ Gerald E. Euerst

CERTIFICATE OF SERVICE

A copy of the foregoing Ruling On Motion Of Defendant John Makley, M.D. for Civil Rule 11 Sanctions has been sent by regular U.S. mail this 2 day of January, 1991, to: John V. Jackson II, Esq., 1001 Lakeside Avenue, Suite 1600, Cleveland, Ohio 44114-1192, Michael Brittain, Esq., 1800 Society Building, Cleveland, Ohio 44114; and to Charles Kampinski, Esq., 1530 Standard Building, Cleveland, Ohio 44113.

LINDA ROCKER SOGG, JUDGE

[p. 782] Now, it is the law in Ohio that punitive damages may not be awarded in a wrongful death cause of action. Punitive damages, however, may be awarded in a survivorship action brought by the representative of the deceased's estate or in an action for the loss of the deceased person's services or consortium.

Now, the purpose of awarded punitive damages is to punish a wrongdoer and to hold him up as an example to others in order to deter another person from performing in a like or similar manner.

If you find for the plaintiff and award damages, actual damages, you may also consider whether or not you will separately award punitive damages.

Obviously, if you do not find actual [p. 783] damages, you cannot consider punitive damages on the survivorship claim.

Now, punitive damages may be awarded against a defendant as a punishment to discourage others from committing similar wrongful acts.

You are not required to award punitive damages to the plaintiff, and you may not do so unless you find by the greater weight of the evidence that the defendant acted with actual malice.

Actual malice is either that state of mind under which a person is characterized by hatred, ill will or a spirit of revenge, or is a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Probability simply means likelihood. And great probability means a considerable or a sizable likelihood.

Substantial means major, of real importance, of great significance, not trifling or small.

Now, if you would award punitive damages, the amount should be fair and reasonable under [p. 784] all the facts and circumstances. It should not be excessive nor actuated by passion or prejudice.

Punitive damages rests in the sole judgment of the jury, and it should be determined from all the evidence in the case.

If no amount is awarded for punitive damages under those circumstances, then on the appropriate verdict form you should write in none.

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

No. 94-781

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

HARRY E. FIGGIE III, M.D.,

Petitioner,

v.

AARON MOSKOVITZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Aaron Moskovitz.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent Aaron Moskovitz respectfully requests that the Court deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On October 2, 1986, Margaret Moskovitz went to Petitioner, Harry E. Figgie, III, M.D., with a lump on the back of her left ankle and a history of having two prior

tumors removed from her leg. There was no dispute that the standard of medical care required an immediate biopsy of the lump. Figgie did not biopsy the lump on that visit, nor on any of the 17 subsequent visits to his office spanning a period of thirteen months. When Figgie finally did the biopsy, the cancer had spread throughout Mrs. Moskovitz's body. After having her leg amputated and undergoing a period of pain and suffering and eleven hospital admissions, she died on December 5, 1988.

After the biopsy revealed that the lump was cancer Figgie falsified his office records, destroying some, whiting out others and creating "telephone entries" in his secretary's notebooks. Figgie repeatedly denied that the lump was brought to his attention in October 1986, claiming instead that Mrs. Moskovitz did not complain of it until February 1987. He also claimed that he recommended a biopsy to her on several occasions and she refused to have it done. The falsifications of the medical records provided the basis for these claims.

However, original unaltered records from other health care providers were found by Respondent during the discovery process. Those records corroborated the testimony of Mrs. Moskovitz's family that Figgie was aware of the lump in October 1986, and did nothing about it for thirteen months.

SUMMARY OF THE ARGUMENT

Petitioner, Harry E. Figgie, III, M.D. was adjudged in the state courts to have committed malpractice causing Margaret Moskovitz's death, and acting with malice in an attempted cover-up of his conduct by the alteration and destruction of her medical records. Figgie's intent in falsifying the records was to shift the blame for her death away from himself and onto Mrs. Moskovitz.

Despite his egregious conduct, Figgie received an abundance of due process in the state courts. Prior to trial, the case was submitted to a medical arbitration panel. That panel, including Figgie's own handpicked arbitrator, found against him and found that his alterations to the medical record "were subsequent changes of the record done to justify Dr. Figgie's conduct."

The case was then heard by a jury who found that Dr. Figgie's records were altered and that he acted maliciously. The jury was charged according to the standards set forth in *Preston v. Murty*, (1987) 32 Ohio St. 3d 334, 512 N.E. 2d 1174, requiring them to find that Figgie acted with actual malice before punitive damages could be awarded. The jury returned both compensatory damages and an award of punitive damages of Three Million Dollars ($3,000,000.00).

The jury's verdict was reviewed by the trial court judge pursuant to a Motion for New Trial and for Judgment Notwithstanding the Verdict filed by Dr. Figgie. The trial court judge upheld the jury's verdict.

The case was appealed to the Ohio Court of Appeals, Eighth District and then the Ohio Supreme Court. The propriety and amount of punitive damages were reviewed at each level. The Ohio Supreme Court found that punitive damages were properly awarded based on Dr. Figgie's malicious conduct, but required Appellant Mr. Moskovitz to choose between a remittitur of two million dollars or a new trial only to determine the amount of punitive damages to be awarded.

Petitioner chose to have this case decided by a jury, which found in accordance with clear standards that Petitioner acted with actual malice and imposed punitive damages. That determination was subsequently judicially

reviewed by three separate tribunals and upheld by the Ohio Supreme Court. Therefore the due process requirements of the Fourteenth Amendment were met in this case.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

NO FEDERAL CONSTITUTIONAL ISSUES ARE PRESENTED IN THIS CASE AND THEREFORE A WRIT OF CERTIORARY SHOULD NOT BE GRANTED.

This court held in *TXO Production Corp. v. Alliance Resources Corp*, 113 S.Ct. 2711 (1993) that where there has been judicial review of a jury's award of punitive damages and the award was not the result of an unfair procedure that the due process requirements of the Fourteenth Amendment have been satisfied.

Petitioner does not assert that the amount of punitive damages is excessive or that the award resulted from an unfair procedure. The grounds relied upon in the Petition for Writ of Certiorari are that the award is contrary to Ohio common law or that Petitioner has not been found to have committed the malicious acts.

Neither of these grounds are true nor do they pose a federal constitutional question. Petitioner is merely seeking to have this court make different factual determinations than those already made by the jury and upheld by the Ohio Supreme Court.

The common law of Ohio has always recognized that the commission of a tort aggravated by the malicious conduct of the Defendant may result in the imposition of punitive damages. *Preston v. Murty*, (1987) 32 Ohio St.

3d 334 512 N.E. 2d 1174. *Richard v. Hunter* (1949) 151 Ohio St. 185, 39 O.O. 24, 85 N.E. 2d 109.

Preston defines malice as:

> Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston* syllabus (emphasis in original).

The jury was charged in accordance with this definition.

Petitioner raised these same issues in the Ohio Supreme Court where they were reviewed in depth and soundly rejected. Petitioners reliance upon the precedents of *Shimola v. Nationwide Ins. Co.* (1986) 25 Ohio St. 3d 84, 25 OBR 136, 495 N.E. 2d 391 and *Bishop v. Grdina* (1985) 20 Ohio St. 3d 26, 20 OBR 213, 485 N.E. 2d 75 is misplaced.

> *Shimola* and *Bishop*, supra, stand for the age-old proposition that proof of actual damages in an underlying cause of action is a necessary predicate for an award of punitive damages.
>
> * * *
>
> Punitive damages are awarded as a mere incident of the cause of action in which they are sought. *Id.* Thus, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered. (App. 21).

In both *Bishop* and *Shimola* no compensatory damages were awarded on the tort claims underlying the punitive claim. In the case at bar there was a compensatory award on the underlying tort claim thus satisfying the

common law requirement of proof of actual damages in the underlying cause of action.

Additionally, the Ohio Supreme Court expressly rejected the notion that a separate cause of action for spoliation of evidence is the only manner in which Figgie's conduct could be addressed and remedied. (App. 23).

Figgie's entire Petition is premised on three misstatements of fact. Petitioner represents to this court that "No determination was ever made, however, that the claimed behavior did in fact occur." (Petition page 28). This is totally false, the jury made a specific finding as to this fact. The Ohio Supreme Court was convinced that there was sufficient evidence that "medical records were altered, destroyed or concealed by Figgie in an effort to conceal his medical negligence." (App. 26).

> Figgie's alteration of records exhibited a total disregard for the law and the rights of Mrs. Moskovitz and her family. * * * We find that the evidence adduced at trial fully supported an award of punitive damages under the standards set forth in the *Preston* syllabus. (App. 26).

Petitioner also misrepresented the state court proceedings by representing to this court that his malicious conduct was "wholly unconnected to the tortious or actionable conduct that is the subject of the lawsuit." (Petitioner page 10).

The Ohio Supreme Court concluded:

> In our judgment, Figgie's alteration of records was inextricably intertwined with the claims advanced by Appellant for medical malpractice, and the award of compensatory damages on the survival claim formed the necessary predicate for the award of punitive damages based upon the alteration of medical records. (App. 23-24).

In addition to the findings of the Ohio Supreme Court, Petitioner himself admitted that the maintenance of a patient's medical record was part and parcel of the care and treatment rendered to the patient and that alteration of medical records exhibits a flagrant disregard for the rights and safety of others. Therefore by his own testimony his conduct was malicious as defined by *Preston*, supra, and was inextricably intertwined with the underlying tort.

Finally, Petitioner misrepresents that the award of punitive damages in this case "markedly, and dangerously, departs from the common law." (Petition page 7).

The Ohio Supreme Court held:

> We hold that in a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of "actual malice" as that term is defined in the syllabus of *Preston v. Murty, supra.* An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm. (App. 27).

There is nothing in this holding that departs from common law and far from being dangerous, it protects the innocent victims of malpractice from any attempt by the wrongdoer to deprive the victim of compensation for the harm they have suffered.

Petitioner asks this Court to condone the alteration and falsification of records after the fact, to cover-up

negligence. That is not the law of Ohio. The Ohio Supreme Court held:

> If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less. Figgie's conduct of altering records should not go unpunished. We should warn others to refrain from similar conduct and an award of punitive damages will do just that. (App. 24).

CONCLUSION

Petitioner's complaint can not be with the amount of due process he received in the state courts. His complaint is with the result causing him to live up to the consequences of his malicious conduct. Dissatisfaction with the result achieved in state court is not grounds for review by the United States Supreme Court. Therefore, Respondent respectfully requests that the petition be overruled.

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APPENDIX

The Supreme Court of Ohio

1994 TERM — To wit: July 27, 1994

Aaron Moskovitz, Appellant,	:	
v.	:	Case No. 93-278
Mt. Sinai Medical Center et al.	:	JUDGMENT ENTRY
[Harry E. Figgie III, M.D., et al., Appellees.]	:	APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is remanded consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellees his costs herein expended; and that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

COSTS:

Docket Fee, $40.00, paid by Charles Kampinski.

Printing of Record, $4,590.49, paid by Charles Kampinski.

(Cuyahoga County Court of Appeals; Nos. 60464 & 61166)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

(Cite as: 69 Ohio St.3d 638, 635 N.E.2d 331)

MOSKOVITZ, Exr., et al., Appellants,

v.

MT. SINAI MEDICAL CENTER et al.; Figgie et al., Appellees.

No. 93-278.

Supreme Court of Ohio.

Submitted March 2, 1994.

Decided July 27, 1994.

Syllabus by the Court

1. In a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of "actual malice" as that term is defined in the syllabus of Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174. An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm.

2. In prejudgment interest determinations pursuant to R.C. 1343.03(C), the phrase "failed to make a good faith effort to settle" does not mean the same as "bad faith." (Kalain v. Smith [1986], 25 Ohio St.3d 157, 25 OBR

201, 495 N.E.2d 572, followed; Villella v. Waikem Motors, Inc. [1989], 45 Ohio St.3d 36, 543 N.E.2d 464, modified.)

3. In an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of the contents of an insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered.

4. An order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of "final order" set forth in R.C. 2505.02. Such an order does not determine the action or prevent a judgment, nor is it rendered in a special proceeding. Thus, an appeal from such an order must await final judgment in the prejudgment interest proceeding. (Bell v. Mt. Sinai Med. Ctr. [1993], 67 Ohio St.3d 60, 616 N.E.2d 181, modified.)

This is a case involving medical malpractice and the death of an elderly woman, Mrs. Margaret Moskovitz. The facts giving rise to this appeal involve the conduct of Dr. Harry E. Figgie III, appellee, who failed to timely diagnose and treat a malignant tumor on Moskovitz's left leg and altered certain records to conceal the fact that malpractice had occurred.

In 1978, Moskovitz was treated by Edward H. Gabelman, M.D., for a tumor on her left leg. The tumor was removed and found to be benign. In 1984, Gabelman completely and successfully removed a second mass from Moskovitz's left leg. This mass was found to be a low-

grade malignant dermatofibrosarcoma protuberans. Gabelman performed the 1984 surgery at Mt. Sinai Medical Center ("Mt. Sinai").

In 1985, Moskovitz was referred to Dr. Figgie, an orthopedic surgeon, for treatment of a degenerative arthritic condition in her knees. Figgie was employed by University Orthopaedic Associates, Inc. ("University Orthopaedic"), and specialized in prosthetic joint replacements and degenerative diseases. In October 1985, Figgie performed surgery upon Moskovitz at University Hospitals of Cleveland ("University Hospitals"), replacing Moskovitz's knee joints with artificial knee joints. In May 1986, Moskovitz underwent additional knee surgery performed by Dr. Figgie. Between May and August 1986, Moskovitz visited Figgie's office on a number of occasions due to complications arising from the knee surgeries.

On October 2, 1986, Moskovitz visited Dr. Figgie's office, complaining of a lump on her leg. Figgie examined Moskovitz and detected "a small calcified lesion along the tendoAchilles." Figgie did not recommend a biopsy of the lesion and reassured Moskovitz that nothing was wrong. Figgie was aware that tumors had been removed from Moskovitz's left leg in 1978 and 1984.

On November 3, 1986, Moskovitz was admitted to University Hospitals for a right knee revision. Prior to surgery, Moskovitz was examined by Rick Magas, a registered nurse. Magas's written report of the examination, signed by Dr. Figgie, noted the existence of a firm nodule measuring one centimeter by one centimeter on Moskovitz's left Achilles tendon. Figgie performed the

right knee revision on November 5, 1986. Following surgery, Moskovitz was examined on Figgie's behalf by Dr. G. Balourdas, a resident physician at University Hospitals. A discharge summary prepared by Balourdas (and signed by Figgie) noted the existence of a "[l]eft Achilles tendon mass, [1] x 1 cm. nodule." The report indicated that the mass had been present for some time.

Moskovitz continued to see Dr. Figgie through November 1987. On November 10, 1987, Figgie finally removed the mass that had been growing on Moskovitz's left leg.[1] On November 13, 1987, the tumor was found to be an epithelioid sarcoma, a rare form of malignant soft-tissue cancer. A bone scan revealed that the cancer had metastasized to Moskovitz's shoulder and right femur.

Immediately following the diagnosis of cancer, Moskovitz's care was transferred to Figgie's partner at University Orthopaedic, Dr. John T. Makley, an orthopedic surgeon specializing in oncology. At that time, Makley received Figgie's original office chart, which contained seven pages of notes documenting Moskovitz's course of treatment from 1985 through November 1987. Makley thereafter referred Moskovitz to radiation therapy at University Hospitals. Apparently, in November 1987, without Figgie's knowledge, Makley sent a copy of page seven of Figgie's office notes to the radiation department at University Hospitals.

---

[1] The record reveals that in November 1986, the mass measured approximately one centimeter by one centimeter in size. The tumor had doubled in size by September 1987 and continued to grow until it was finally removed in November 1987.

In December 1987, Figgie or someone on his behalf requested that Dr. Makley return Figgie's office chart pertaining to the care of Moskovitz. In December 1987, Makley was Moskovitz's primary treating physician and Figgie was no longer directly involved in Moskovitz's care and treatment. On December 14, 1987, Makley's secretary forwarded the chart to Figgie's office. Figgie's secretary then sent a copy of the chart to Dr. Zev Ashenberg, Moskovitz's psychologist. The copy was received by Ashenberg sometime between December 14 and 18, 1987. In January 1988, Makley's secretary requested that Figgie's office return the chart to Makley. At this time, it was discovered that the original chart had mysteriously vanished, never to be seen again.

In February 1988, Makley amputated Moskovitz's left leg. In May 1988, while obtaining a prosthesis for her leg, Moskovitz accidentally fell and broke her right hip due to the cancer having spread to her hip bone. Moskovitz was taken to Hillcrest Hospital and was treated for her injuries. Thereafter, Moskovitz underwent chemotherapy at Hillcrest Hospital.

On October 21, 1988, Moskovitz filed a complaint for discovery in the Court of Common Pleas of Cuyahoga County, seeking to ascertain information relative to a potential claim for medical malpractice. On November 4, 1988, Moskovitz and her husband, Aaron Moskovitz, filed an amended complaint against, inter alia, Figgie, Makley, University Orthopaedic, University Hospitals, Gabelman and Mt. Sinai. The amended complaint set forth allegations of medical malpractice against Figgie and others for failing to timely diagnose and treat Moskovitz's cancer before the cancer had metastasized.

The amended complaint further alleged that Makley committed medical malpractice by unnecessarily removing Moskovitz's left leg after the cancer had already spread. In addition, Moskovitz and her husband set forth claims of negligent hiring against University Hospitals and Mt. Sinai.

On December 5, 1988, Moskovitz died as a result of the cancer. Prior to her death, Moskovitz's testimony was preserved by way of videotaped deposition.

Makley was deposed on January 30, 1989. At his deposition, Makley produced a copy of page seven of Figgie's office chart. (That copy was identical to the copy ultimately recovered by plaintiff's counsel from the radiation department records at University Hospitals.) The copy produced by Makley contained a typewritten entry dated September 21, 1987, which states: "Mrs. Moskovitz comes in today for her evaluation on the radiographs reviewed with Dr. York. He was not impressed that this [the mass on Moskovitz's left leg] was anything other than a benign problem, perhaps a fibroma. We [Figgie and York] will therefore elect to continue to observe." However, the photostatic copy revealed that a line had been drawn through the sentence "We will therefore elect to continue to observe." The copy further revealed that beneath the entry, Figgie had interlineated a handwritten notation: "As she does not want excisional Bx [biopsy] we will observe." The September 21, 1987 entry was followed by a typewritten entry dated September 24, 1987, which states: "I [Figgie] reviewed the x-rays with Dr. York. I discussed the clinical findings with him. We [Figgie and York] felt this to be benign most likely a fibroma. He [York] said that we could observe and I concur." At some

point, Figgie had also added to the September 24, 1987 entry a handwritten notation, "see above," referring to the September 21 handwritten notation that Moskovitz did not want an excisional biopsy.

Figgie was deposed on March 2, 1989. At his deposition, Figgie produced records, including a copy of page seven of his office chart. As his original chart had been lost in December 1987 or January 1988, Figgie had had this copy made *from the copy of the chart that had been sent to Ashenberg in December 1987*. The September 21, 1987 entry in the records produced by Figgie did not contain the statement "We will therefore elect to continue to observe." Apparently, that sentence had been deleted (whited-out) on the original office chart from which Ashenberg's copy (and, in turn, Figgie's copy) had been made, in a way that left no indication on the copy that the sentence had been removed from the original records.

During his deposition, Figgie maintained that he did not discover the mass on the left Achilles tendon until February 23, 1987, and that Moskovitz had continually refused a workup or biopsy. To support these claims, Figgie produced copies of his secretary's notebooks, which contained messages of telephone calls received by Figgie's office from Moskovitz during the course of her treatment. One entry appearing in the telephone logs indicates that Moskovitz called Figgie on February 26, 1987. The secretary's entry in the notebook states: "Moskovitz, *right foot*, coming in today." (Emphasis added.) Dr. Figgie's pencilled-in notation beside that message reads: "Patient seen, refuses workup, *left foot*, workup *left foot*." (Emphasis added.) The telephone logs also contained an entry for May 5, 1987, indicating that

Moskovitz had called Figgie's office that day complaining of pain in her left leg. Figgie's pencilled-in notation regarding the May 5 entry states that Moskovitz refused to have the tumor biopsied. However, an entry in the telephone logs for September 11, 1987, indicates that Moskovitz had called Figgie, complaining of the lump on her left leg. Figgie's pencilled-in notation next to that entry states that Moskovitz had agreed to a workup on September 11, 1987. The September 11 notebook entry was directly contradictory to the handwritten alterations made by Figgie to the September 21 entry on page seven of the office chart.

During discovery, another copy of page seven of Figgie's office chart (identical to the copy produced by Makley during his deposition) was recovered from the radiation department records at University Hospitals.[2] This copy had been received by the radiation department in November 1987, when Moskovitz was referred to radiation therapy by Dr. Makley. Therefore, it became apparent that the final sentence in the September 21, 1987 entry had been deleted (whited-out) from Figgie's original office chart sometime between November 1987 (when the radiation department obtained a copy of the record) and mid-December 1987, when Ashenberg received a copy of the record from Figgie's office. Presumably, that alteration occurred in December 1987 while the original chart was in the possession of Dr. Figgie.

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[2] We surmise from the information before us that the copy of page seven Makley produced at his deposition was made from the copy in the radiology department records at University Hospitals.

All versions of the September 21, 1987 entry obtained during discovery contained the handwritten notation by Figgie "As she does not want excisional Bx [biopsy] we will observe." That sentence clearly suggested that it was Moskovitz's choice not to have the tumor biopsied during the course of her treatment with Figgie, whereas the typewritten text as it originally appeared in the September 21, 1987 entry indicated that it was Figgie's decision to observe the growth because the tumor was thought to be benign.

Eventually, Figgie's entire office chart was reconstructed from copies obtained through discovery. The reconstructed chart contains no indication that a workup or biopsy was recommended by Figgie and refused by Moskovitz at any time prior to August 10, 1987.[3] Entries in the reconstructed chart for October 2, 1986, February 23, 1987 and May 7, 1987, refer to the mass, but do not mention a suggested biopsy or the refusal of a biopsy. Additionally, none of the typewritten entries appearing in the reconstructed chart indicates that a workup or biopsy was recommended or refused after August 10, 1987, with the exception of a September 29, 1987 entry, which states that Figgie recommended a biopsy and Moskovitz "did not want to proceed" with a biopsy at that time.

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[3] An August 10, 1987 entry in the reconstructed chart states: "Mrs. Moskovitz returns today. She has had some increase in that swelling and that mass behind her ankle. She is not particularly tender and it appears to be calcific. She did not want to proceed with radiographs or work-up today. We did discuss the possibility of needle or incisional biopsy but she deferred on this."

In her videotaped deposition, Moskovitz claimed that she never refused to have the tumor biopsied. According to Moskovitz, Figgie had repeatedly assured her throughout the course of her treatment that the lump on her left Achilles tendon was merely "tendons."

Following Moskovitz's death, Aaron Moskovitz, executor of Moskovitz's estate, appellant, was designated as plaintiff in the lawsuit in his capacity as executor. In April 1989, a second amended complaint was filed (against all the defendants named in the first amended complaint) to include claims for wrongful death and survivorship. Additionally, appellant asserted allegations against Figgie and University Orthopaedic for punitive damages based upon the alteration of records.

The matter was referred to nonbinding "arbitration"[4] in accordance with R.C. 2711.21 and local rules of court. However, the trial court ordered that the issue of punitive damages was not to be considered at the "arbitration" hearing. On December 7, 1989, the three-member "arbitration" panel issued its findings and "award." The panel found in favor of all defendants participating in that proceeding (including Makley), with the exception of Figgie and University Orthopaedic. The panel made the following findings regarding Figgie:

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[4] In *Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St.3d 708, 711, 590 N.E.2d 1242, 1245,* the plurality opinion stated that: " 'Nonbinding arbitration' is a contradiction in terms. For a dispute resolution procedure to be classified as 'arbitration,' the decision rendered must be final, binding and without any qualification or condition as to the finality of an award * * * ."

"3.) * * * The evidence supported a finding that plaintiffs' [sic] decedent had a very good chance of long term survival if the tumor was found to be malignant at a time when it was less than one centimeter in size. The evidence supported the fact that the tumor had not grown in size as of May 7, 1987. If Dr. Figgie had performed a biopsy prior to this date, the cancer would not have metastasized and the decedent would have recovered.

"4.) Dr. Figgie failed to recommend at the appropriate time that the growth on the decedent's left ankle be worked up to determine whether or not it was a malignant tumor. The plaintiff testified [by videotaped deposition] he never made such a recommendation to her. Dr. Figgie's office chart, which is the primary reference material in analyzing a physician's conduct, is filled with contradictions and inconsistencies. The panel did not find Dr. Figgie's deposition persuasive in explaining or providing a basis for justifying these irregularities. His secretary's telephone notes were of questionable probative value.

"5.) Even if Dr. Figgie was first informed of the growth on February 23, 1987, he still fell below acceptable standards of care because he did not conduct further investigation till [sic] x-rays performed in September 1987. *All handwritten entries which appear on or prior to September 24, 1987, indicating that a biopsy was recommended or that the decedent refused further work-up were subsequent changes of the records done to justify Dr. Figgie's conduct.* The sentence 'We will therefore elect to continue to observe' on the September 21, 1987 entry was whited out and the handwritten entry 'as she dose [sic] not want excisional

biopsy we will observe' was a subsequent alteration of the records." (Emphasis added.)

Two of the three members of the panel "awarded" appellant $1,352,881.20 in compensatory damages against Figgie and University Orthopaedic. The third member of the panel dissented on the basis that that "award" was too low. The dissent suggested that an "award" of not less than $2 million was warranted and that an award of $5 million would be justified "in light of the facts presented on liability as well as damages." In addition to this award of compensatory damages, the panel separately "awarded" over $2.9 million in hedonic damages.

Figgie and University Orthopaedic filed notices of nonacceptance of the "award." Appellant filed a notice of nonacceptance concerning the panel's findings in favor of Makley. On December 9, 1989, appellant filed a third amended complaint, naming, as defendants, Figgie, Makley and University Orthopaedic. The case proceeded to trial on the third amended complaint. Without objection from any party, the jury was informed of the outcome of the "arbitration" proceeding and a copy of relevant portions of the "arbitration" decision was admitted into evidence for the jury's consideration.[5]

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[5] Although no party has raised the issue, R.C. 2711.21 was amended, effective October 20, 1987, to provide that a decision rendered in an "arbitration" proceeding authorized by that statute is not admissible into evidence at trial. See Am.Sub.H.B. No. 327, 142 Ohio Laws, Part II, 3338-3339. Note that R.C. 2711.21 as it appears in Page's Ohio Rev.Code Ann. (1992) contains a misprint. Specifically, the final paragraph of R.C. 2711.21 should be designated subsection (D).

At trial, Figgie claimed that he first discovered the tumor on Moskovitz's left leg on February 23, 1987, at which time he recommended a workup in order to consider a biopsy. According to Figgie, Moskovitz refused to have the tumor worked up until September 1987 or biopsied until October or November 1987. However, Figgie's reconstructed office chart indicated that the mass had been discovered by Figgie as early as October 2, 1986. Additionally, the hospital records from Moskovitz's November 1986 knee surgery suggested that the tumor should have been discovered by Figgie before February 23, 1987. Specifically, the report of the preoperative examination by nurse Rick Magas (plaintiff's Exhibit 3) and the discharge summary prepared by Dr. Balourdas (plaintiff's Exhibit 5), both of which were signed by Figgie, noted the existence of the lump on Moskovitz's left Achilles tendon in November 1986. The discharge summary also stated that the mass had been present for some time. Moreover, a February 23, 1987 entry in Figgie's reconstructed office chart contains no references to a suggested biopsy or the refusal of a biopsy.

Figgie was questioned extensively concerning the alteration of medical records. Figgie claimed that after the September 21, 1987 entry had been typed from his dictated notes, he reviewed that entry and found it to be inaccurate. Therefore, according to Figgie, he drew a line through the sentence "We will therefore elect to continue to observe," and added a handwritten notation to reflect that Moskovitz had, in fact, refused to have the tumor biopsied. Figgie denied whiting-out any portion of the typewritten text and claimed to have no knowledge concerning who might have altered the chart in that manner.

Figgie admitted that his original office chart had been lost and that certain slides of Moskovitz's tumor had disappeared from Makley's teaching file. Figgie denied any involvement in the loss of any records. Figgie was also questioned concerning the discrepancy between his handwritten notation in the September 21, 1987 entry and the entry appearing in the telephone journals for September 11, 1987. At one point, Figgie admitted that the two entries were "directly contradictory."

Figgie denied that his February 26, 1987 and May 5, 1987 pencilled-in notations in the telephone journals had been fabricated by him to avoid liability. While those notations indicated that Moskovitz had refused a biopsy in February and May 1987, none of the typewritten entries in the chart for February or May 1987 contained any reference to a suggested biopsy or the refusal of a biopsy. Figgie testified that defacing and destroying medical records reflects a conscious disregard for the rights and safety of a patient. Figgie never sought to have the telephone journals admitted into evidence, although he characterized the entries in the journals as part of his medical records pertaining to the care and treatment of Moskovitz.

Figgie's secretary, Linda Kennedy, testified at trial that she may have whited-out the portions of the September 21, 1987 entry to clean up the records before sending copies to other doctors. However, Kennedy had testified at her deposition that she never whited-out any information on Moskovitz's medical records.

The jury viewed Moskovitz's videotaped deposition in which Moskovitz claimed that she never refused to

submit to a biopsy. According to Moskovitz, Figgie had continually reassured her during the course of her treatment that the lump on her left leg was merely "tendons." Aaron Moskovitz also testified that Figgie consistently reassured the decedent that the lump on her leg was just "tendons." According to Aaron, Figgie never recommended a biopsy at any time prior to October or November 1987 and Figgie never informed Mrs. Moskovitz that the lump could be cancerous.

John F. Burke, an economist, testified concerning the value of Moskovitz's services to her family. Burke concluded that the net present value of the loss of services was between $67,506 and $282,614. Burke also testified concerning the loss of income to Aaron Moskovitz as a result of Mrs. Moskovitz's death. According to Burke, the present value of Social Security benefits the decedent would have received over Aaron's remaining projected life span and the value of a yearly stipend the decedent had been receiving from Germany amounted to $22,891 and $30,521, respectively.

Moskovitz's family members testified concerning the losses they suffered and will continue to suffer as a result of Moskovitz's death. Moskovitz's husband and children witnessed the ravaging effects of the cancer during the final year of Moskovitz's life. As a result of the cancer, Moskovitz underwent an amputation of her left leg and was confined to a wheelchair. She suffered a broken hip due to the cancer having spread to her hip bone. She was a patient at Hillcrest Hospital ten times between May 1988 and the date of her death. Moskovitz underwent extensive radiation therapy and chemotherapy, without success. The medical records, the testimony of

Moskovitz's family members and Moskovitz's videotaped deposition documented a thirteen-month period of extreme suffering and hardship for the decedent and her family. Appellant's economic damages alone were estimated at approximately $437,749.

Appellant's medical expert, Dr. Charles Bart Engleberg, an oncologist, testified at trial that whether the tumor was discovered by Figgie in October 1986 or February 1987, Figgie deviated from accepted standards of care by failing to remove the tumor prior to the end of March 1987. Engleberg testified that had the tumor been removed during the first few months of 1987, before it had exceeded approximately one centimeter by one and a half centimeters in size, Moskovitz would have fully recovered and the cancer would not have metastasized.

Dr. Michael Simon, an orthopedic surgeon, and Dr. Makley testified as medical experts for the defense. Based upon a later review of x-rays taken during Moskovitz's November 1986 hospital admission, these doctors testified that the cancer had metastasized prior to November 1986, rendering the decedent's death imminent. On rebuttal, Dr. Ralph J. Alfidi, a radiologist, stated that there were no indications in the x-rays taken in November 1986 that the cancer had metastasized by that time. According to Dr. Alfidi, dark spots on the x-rays such as those identified by Simon and Makley as evidence of the spread of cancer generally indicate loss of bone density commonly occurring in postmenopausal women.

During the trial, Makley was granted a directed verdict, as no expert medical testimony had been presented

against him. Additionally, appellant dismissed all claims against University Orthopaedic.

On December 20, 1989, the jury returned its verdict in favor of appellant and against Figgie. The jury awarded appellant $2 million on the survival claim, $1.25 million on the claim for wrongful death, $5,000 for funeral and burial expenses and $3 million in punitive damages. In response to an interrogatory concerning its finding of liability, the jury stated:

"Dr. Figgie's records indicate that he was aware of a lesion on the decedent's tendo achilles on 10/2/86. Plaintiff's Exhibits 3 and 5 indicate that, as of 11/3/86, Dr. Figgie was aware of the decedent's left tendo achilles mass and that it had been present for some time. Even with consideration of the decedent's past medical history, Dr. Figgie did not biopsy the tumor at the point of discovery. Hospital records indicate that the decedent's tumor had not metastisized [sic] by 11/3/86. We believe the decedent had a very good chance of long term survival if the tumor was found to be malignant before it exceeded one centimeter in size.

"Also, Dr. Figgie did not maintain his records as according to medical standards."

The trial court entered judgment in accordance with the jury's verdict. Figgie filed a motion for judgment notwithstanding the verdict or, alternatively, a motion for a new trial. Figgie's motion was denied, as was a motion by appellant for prejudgment interest.

Figgie appealed to the court of appeals. Appellant cross-appealed on the issue of prejudgment interest. On

January 2, 1991, during the pendency of the appeal, the trial court granted a motion by Makley for Civ.R. 11 sanctions against appellant's trial counsel, Charles Kampinski. The trial court awarded Makley $4,000 and Kampinski appealed. The appeals were thereafter consolidated.

The court of appeals upheld the finding of liability against Figgie on the wrongful death and survival claims. However, in a split decision, the court of appeals found that the award of compensatory damages was excessive and that appellant was not entitled to punitive damages as a matter of law. Therefore, by a two-to-one vote, the court of appeals reversed the judgment of the trial court as to the award of damages and remanded the cause for a new trial only on the issue of compensatory damages. Additionally, by a divided vote, the court of appeals affirmed the judgment of the trial court denying appellant's motion for prejudgment interest and affirmed the award of Civ.R. 11 sanctions against Kampinski.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Charles Kampinski Co., L.P.A., Charles Kampinski, Christopher M. Mellino and Donna Taylor-Kolis, for appellants.

Fritz Byers; Jacobson, Maynard, Tuschman & Kalur Co., L.P.A., John V. Jackson II, Robert Seibel and Steven Hupp, for appellee.

Steven S. Zaleznik, Michael R. Schuster and Bruce B. Vignery; Patton, Boggs & Blow and Steven M. Schneebaum, urging reversal for amicus curiae, American Ass'n of Retired Persons.

Jeffrey R. White, urging reversal for amicus curiae, Ass'n of Trial Lawyers of America.

Nurenberg, Plevin, Heller & McCarthy Co., L.P.A., Andrew P. Krembs and Kathleen J. St. John, urging reversal for amicus curiae, Ohio Academy of Trial Lawyers.

DOUGLAS, Justice.

This appeal presents four issues for our consideration. Were punitive damages, and the amount awarded, appropriate and proper on the facts of this case? Were the compensatory damages awarded for the survival action and for wrongful death excessive? Should prejudgment interest have been allowed? Was it proper to sanction appellant's attorney under Civ.R. 11? Figgie has not appealed and, thus, the finding that Figgie was negligent in his care and treatment of Moskovitz is not at issue.

I

Punitive Damages

The jury's award of punitive damages was based upon Figgie's alteration, falsification or destruction of medical records. The punitive damages were awarded in connection with the survival action. The court of appeals' majority vacated the award of punitive damages for two reasons. First, the court of appeals' majority determined that punitive damages were not available under the circumstances of this case, since Figgie's act of altering and

destroying records did not directly cause actual harm to appellant – i.e., records disappeared and were altered after the diagnosis of terminal illness and the alteration and disappearance of the records did not adversely affect appellant's claims. Second, the court of appeals' majority found that appellant failed to establish a right to punitive damages under the standards set forth in *Preston v. Murty (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.* We disagree.

The court of appeals held that for punitive damages to be awarded, appellant was required to prove "a harm distinct from the medical negligence claim and attributable solely to the alleged alteration of medical records." To support this conclusion, the court of appeals relied upon *Shimola v. Nationwide Ins. Co. (1986), 25 Ohio St.3d 84, 25 OBR 136, 495 N.E.2d 391; Bishop v. Grdina (1985), 20 Ohio St.3d 26, 20 OBR 213, 485 N.E.2d 704; and Rouse v. Riverside Methodist Hosp. (1983), 9 Ohio App.3d 206, 9 OBR 355, 459 N.E.2d 593.* However, nothing in these cases suggests that the malicious intent necessary to sustain an award of punitive damages must itself proximately result in some compensable harm.

Shimola and Bishop, supra, stand for the age-old proposition that proof of actual damages in an underlying cause of action is a necessary predicate for an award of punitive damages. See, also, *Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273,* and *Richard v. Hunter (1949), 151 Ohio St. 185, 39 O.O. 24, 85 N.E.2d 109.* In Ohio, no civil action may be maintained simply for punitive damages. *Bishop, supra,* 20 Ohio St.3d at 28, 20 OBR at 214, 485 N.E.2d at 705. Rather, punitive damages are awarded as a mere incident of the

cause of action in which they are sought. *Id.* Thus, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered.

Bishop was a case involving an award of punitive damages where no compensatory damages were awarded on the underlying cause of action. In *Bishop*, we held that proof of actual damages on the underlying claim is a necessary predicate for an award of punitive damages. *Id. at 28, 20 OBR at 214, 485 N.E.2d at 705.* In so holding, we relied upon *Richard, supra,* which also involved a situation where punitive damages were found to be improper in the absence of an award of compensatory damages on an underlying claim. The court of appeals in the case at bar seized upon the statement in *Bishop* that "[p]unitive damages are awarded as punishment for *causing compensable* harm and as a deterrent against similar action in the future." (Emphasis added.) *Id.* at 28, 20 OBR at 214, 485 N.E.2d at 705. However, that statement in *Bishop* does not require the conclusion that malicious conduct giving rise to punitive damages must produce some compensable harm. Again, the matter at issue in *Bishop* was whether an award of punitive damages is legally supportable where no actual harm is shown in the underlying cause of action.

In *Shimola, supra, 25 Ohio St.3d 84, 25 OBR 136, 495 N.E.2d 391,* an insured sued his insurer for the tort of bad faith. The insured sought an award of punitive damages in connection with that claim. The jury awarded no actual damages on the claim, but awarded the insured $160,000 in punitive damages. We held that the award of punitive damages could not be sustained absent proof of actual

damages *stemming from the underlying claim for bad faith. Id. at 86, 25 OBR at 138, 495 N.E.2d at 393. Shimola* clearly does not support the conclusion reached by the court of appeals' majority.

Here, appellant was awarded compensatory damages in the survival claim for Figgie's medical malpractice and that award formed the necessary foundation for the award of punitive damages. Figgie suggests that his alteration of medical records constitutes a separate claim requiring proof of actual damages, that no actual damages were shown to flow from the alteration, and that punitive damages were therefore improper. In this regard, we have recently held that "[a] cause of action exists in tort for interference with or destruction of evidence * * * ." *Smith v. Howard Johnson Co., Inc. (1993), 67 Ohio St.3d 28, 29, 615 N.E.2d 1037, 1038.* However, nothing in Smith can be interpreted to say that a separate cause of action for spoliation of evidence is the only way such conduct can be addressed and remedied. We expressly reject any such notion. If appellant were constrained to bring a separate cause of action for spoliation of evidence, that claim would inevitably fail, since there is no damage flowing directly from the alteration of records. Therefore, no punitive damages could be awarded to punish the unlawful conduct. Thus, if Figgie's argument is taken to its logical conclusion, litigants and prospective litigants could alter and destroy documents with impunity so long as no actual damage was caused thereby. Of course, if the damning evidence were destroyed without trace, no liability would attach on any claim, since no evidence would remain to implicate the spoliator. In our judgment, Figgie's alteration of records was inextricably

intertwined with the claims advanced by appellant for medical malpractice, and the award of compensatory damages on the survival claim formed the necessary predicate for the award of punitive damages based upon the alteration of medical records.

The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct. *See, e.g., Preston, supra, 32 Ohio St.3d at 335, 512 N.E.2d at 1176; Detling v. Chockley (1982), 70 Ohio St.2d 134, 136, 24 O.O.3d 239, 240, 436 N.E.2d 208, 209; and Calmes v. Goodyear Tire & Rubber Co. (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416, 419.* See, also, *Bishop* and *Richard, supra.* Therefore, it would make no sense for this court to establish a rule requiring that malicious conduct giving rise to a claim for punitive damages must independently cause compensable harm before punitive damages may be awarded. If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case. We believe that such conduct is particularly deserving of punishment in the form of punitive damages and that a civilized society governed by rules of law can require no less. Figgie's conduct of altering records should not go unpunished. We should warn others to refrain from similar conduct and an award of punitive damages will do just that.

We recognize that certain language in *Rouse, supra, 9 Ohio App.3d at 208-209, 9 OBR at 358, 459 N.E.2d at 597,* lends some support to Figgie's and the court of appeals' position that later concealment or destruction of evidence

of negligence cannot render an act of negligence malicious and, thus, punitive damages are unavailable in such a case absent proof of actual harm stemming from the concealment or destruction. However, we are more persuaded by the case of *Spadafore v. Blue Shield (1985), 21 Ohio App.3d 201, 21 OBR 215, 486 N.E.2d 1201.* In *Spadafore,* Judge Moyer (now Chief Justice Moyer) concurred in the following statement of the law concerning punitive damages and the alteration of documents:

"[T]here was some additional evidence, although not substantial, of possible intentional alteration of documents. Such conduct is the type of intentional and deceptive behavior more indicative of actual malice. If such evidence is believed, the jury could award punitive damages. With the proper caution exercised in instructing the jury as to when punitive damages are proper, the issue of punitive damages should have been submitted to the jury." *Id. at 204-205, 21 OBR at 218, 486 N.E.2d at 1205.*

Moreover, in *Calmes, supra, 61 Ohio St.3d at 473, 575 N.E.2d at 419,* this court stated that "[p]unitive damages in this state *are available upon a finding of actual malice.*" (Emphasis added.) The term "actual malice" has been defined in the case of *Preston, supra, 32 Ohio St.3d 334, 512 N.E.2d 1174,* and the definition does not include an element of actual harm. In *Preston,* syllabus, we held that:

"Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and

safety of other persons that has a great probability of causing substantial harm." (Emphasis sic.)

Figgie's alteration of records exhibited a total disregard for the law and the rights of Mrs. Moskovitz and her family. Had the copy of page seven of Figgie's office chart not been recovered from the radiation department records at University Hospitals, appellant would have been substantially less likely to succeed in this case. The copy of the chart and other records produced by Figgie would have tended to exculpate Figgie for his medical negligence while placing the blame for his failures on Moskovitz. We find that the evidence adduced at trial fully supported an award of punitive damages under the standards set forth in the Preston syllabus.

The court of appeals' majority also determined that there was no evidence that Figgie altered or destroyed records to conceal his medical negligence. However, upon a thorough review of the record, we are convinced that the jury was presented with sufficient evidence which, if believed, supported the inference that records were altered, destroyed or concealed by Figgie in an effort to conceal his medical negligence. A unanimous panel of "arbitrators" determined that records were altered with bad motive, and that Figgie was the responsible party. Further, having awarded punitive damages, the jury, which heard the evidence and observed the demeanor of the witnesses, apparently, also so found. A competent and respected trial judge upheld the award of punitive damages and denied a motion for a new trial. With all due respect to the court of appeals' majority, we believe that the appellate court simply substituted its judgment for that of the jury and, thereby, invaded the province of

the finder of fact. Further, as we stated in *Myers v. Garson (1993), 66 Ohio St.3d 610, 614, 614 N.E.2d 742, 745,* "we have often noted in the past, where the decision in a case turns upon credibility of testimony, and where there exists competent and credible evidence supporting the findings and conclusions of the trial court, deference to such findings and conclusions must be given by the reviewing court." In our judgment, the court of appeals' majority erred in holding that, as a matter of law, appellant was not entitled to an award of punitive damages.

Accordingly, we reverse the judgment of the court of appeals on the issue of punitive damages. We hold that in a case involving medical malpractice where liability is determined and compensatory damages are awarded, punitive damages pled in connection with the claim for malpractice may be awarded upon a showing of "actual malice" as that term is defined in the syllabus of *Preston v. Murty, supra.* An intentional alteration, falsification or destruction of medical records by a doctor, to avoid liability for his or her medical negligence, is sufficient to show actual malice, and punitive damages may be awarded whether or not the act of altering, falsifying or destroying records directly causes compensable harm. However, we reiterate that the purpose of punitive damages is to punish and deter. The jury's reaction in awarding $3 million in punitive damages may be understandable, given its findings of Figgie's activities, but it is wrong. Punishment does not mean confiscation. Figgie's net worth (depending on who is believed) is somewhere between $2.1 million and $3 million. We find that a portion of that net worth will send the message.

In determining the appropriate amount of punitive damages to be awarded, we are guided by the perspicuous observations of Judge John W. McCormac in *Shoemaker v. Crawford (1991), 78 Ohio App.3d 53, 603 N.E.2d 1114.* In ordering a remittitur in Shoemaker for an award of compensatory damages found to be excessive, Judge McCormac stated:

"Determining the amount of damages which is the maximum for adequate compensation is not an easy task. No simple mathematical formula can be applied as to either a minimum or a maximum, and there is a wide range between those figures. The decision rests as much on policy considerations as it does anything else and some degree of arbitrariness cannot be totally divorced from the decision, whether made by us or by the jury." *Id. at 66, 603 N.E.2d at 1121-1122.*

Much the same can be said in the case at bar with regard to a determination of the appropriate amount of punitive damages. Upon a review of the record, we find that $1 million in punitive damages is the appropriate amount to be awarded. Therefore, with respect to the jury's verdict for $3 million in punitive damages, we order a remittitur of $2 million.[6] Upon remand, appellant

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[6] Since *Shaffer v. Maier (1994), 68 Ohio St.3d 416, 627 N.E.2d 986,* questions have arisen concerning the authority of an appellate court to order a remittitur. Where a verdict is found to be excessive but not the result of passion or prejudice, an appellate court may order a remittitur with the consent of the prevailing party. In *Chester Park Co. v. Schulte (1929), 120 Ohio St. 273, 166 N.E. 186,* paragraphs five and six of the syllabus, this court held that:

may elect to accept the remittitur, in which case the trial court shall enter judgment in appellant's favor for $1 million in punitive damages. Conversely, appellant may elect to refuse the remittitur, in which case a new trial should be conducted only on the issue of punitive damages. A jury,[7] if one is impanelled for this purpose, shall be instructed that punitive damages in some amount

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"5. The Court of Appeals has the same unlimited power and control of verdicts and judgments as the trial court and may weigh the evidence and exercise an independent judgment upon questions of excessive damages and when no passion or prejudice is apparent may modify and affirm the judgment by ordering a remittitur with the consent of the prevailing party.

"6. If the Court of Appeals in an error proceeding in an action for unliquidated damages finds that the verdict was rendered under the influence of passion or prejudice it has no alternative except to reverse and remand for a new trial." (Emphasis sic.)

In *Duracote Corp. v. Goodyear Tire & Rubber Co. (1983), 2 Ohio St.3d 160, 162-163, 2 OBR 704, 706, 443 N.E.2d 184, 186,* we reaffirmed the principles set forth in the fifth paragraph of the syllabus of Schulte. See, also, *Shoemaker, supra, 78 Ohio App.3d 53, 603 N.E.2d 1114.*

Civ.R. 59(A) sets forth the grounds upon which a new trial may be granted. One ground for the granting of a new trial is that the damages awarded are inadequate or excessive, appearing to have been given under the influence of passion or prejudice. Civ.R. 59(A)(4). Thus, if an award is excessive and appears to be the product of passion or prejudice, a new trial is proper and should be ordered by a reviewing court. However, where the award is found to be excessive but not the product of passion or prejudice, a remittitur may be ordered by the appellate court with the consent of the prevailing party. See Schulte, Duracote and Shoemaker, supra.

[7] We make no determination as to the applicability or constitutionality of R.C. 2315.18 and 2315.21(C)(2).

must be awarded and that the jury's determination is to be based upon the evidence presented to them which, we fully recognize, might require a re-presentation of much of the underlying case.

II

Compensatory Damages

The court of appeals' majority found that the award of compensatory damages for the survival action and wrongful death was excessive and that the jury's award was influenced by passion and prejudice. Accordingly, the court of appeals' majority vacated the award and remanded for a new trial only on the issue of compensatory damages. We find that the court of appeals erred in this regard.

A. Survival Action Award

With respect to the jury's award on the survival claim, the court of appeals' majority found that the award of $2 million was so high that it amounted to a denial of substantial justice, and that the award "was impermissibly influenced by the jury's erroneous consideration of punitive damages." In addition to finding that the jury's consideration of punitive damages was appropriate and proper, we also believe that the jury's consideration of punitive damages cannot form the basis for vacating the award of compensatory damages.

In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the

jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive. See *Toledo, Columbus & Ohio River RR. Co. v. Miller (1923), 108 Ohio St. 388, 402-403, 140 N.E. 617, 621.* In the case at bar, we make no such finding as to the compensatory damages awarded by the jury. The jury's $2 million award on the survival claim is not so manifestly excessive that a conclusion must be drawn therefrom that the award was the product of passion and prejudice. The bulk of the award was obviously for the pain and suffering Moskovitz experienced in the final year of her life, and the jury was undoubtedly in the best position to make the assessment of damages. The record is devoid of any evidence that the jury was wrongfully influenced in returning a large award, and the amount of the award itself is not so manifestly excessive at [sic] to have warranted the court of appeals' interference with the province of the jury. In addition, the trial judge was in the best position to determine whether the award on the survival claim was manifestly excessive or influenced by passion and prejudice. See, generally, *Villella v. Waikem Motors, Inc. (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464, 469, and Larrissey v. Norwalk Truck Lines, Inc. (1951), 155 Ohio St. 207, 219, 44 O.O. 238, 243, 98 N.E.2d 419, 426.* The trial judge refused to set the verdict aside and denied the motion for a new trial. That determination is entitled to deference.

B. Wrongful Death Award

As to the jury's $1.25 million award for wrongful death, the court of appeals' majority held that the award was manifestly excessive in light of the economic damages

proven and in light of Moskovitz's frail condition prior to the onset of her terminal illness. Again, the determination of damages was a question for the jury and the court of appeals was not at liberty to substitute its judgment for that of the finder of fact. The jury heard evidence concerning a variety of damages suffered by the wrongful-death beneficiaries. Although the jury's award was large, it cannot be said with any degree of certainty that the award was excessive. While Moskovitz may have been frail prior to the onset of her illness, the dissent in the court of appeals ably noted that Moskovitz "was neither an amputee, dead, nor dying when Dr. Figgie failed to adequately diagnose and then treat the cancer." Moskovitz's family unquestionably suffered the loss of a loving wife and mother, and the jury was in a far better position than the court of appeals to determine the value of the losses suffered.

The court of appeals' majority also suggested that the jury's award for wrongful death may have been improperly influenced by certain references at trial to Moskovitz's concentration camp experience and her survival of the Holocaust. However, we note that both appellant and Figgie commented and presented evidence on this matter. Moreover, upon a careful review of the entire record, we do not find that the jury's award was affected by passion and prejudice.

Based upon the foregoing, we find that the court of appeals erred in vacating the award of compensatory damages on the claims for survival and wrongful death. Therefore, on those issues, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court.

III

Prejudgment Interest

The issue of prejudgment interest has become a complex question. This case is a perfect example of the problem. Accordingly, the matter of prejudgment interest generally, and in this specific case, needs some discussion.

A. Prejudgment Interest at Common Law

Since the 1800s, Ohio courts have recognized a common-law right to prejudgment interest. In *Hogg v. Zanesville Canal & Mfg. Co. (1832), 5 Ohio 410, 424,* this court said, "But interest is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain made from its use by the debtor." In the last paragraph of the syllabus of Hogg, this court said, "In actions for torts the jury may calculate interest on the damages actually sustained and add it to their verdict."

In *Lawrence RR. Co. v. Cobb (1878), 35 Ohio St. 94,* paragraph four of the syllabus, this court said, "In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included." Further, in *Cobb,* at 98-99, the court stated that "[t]he rule of damages in such case is compensation for the injury, or, in other words, that the injured party should be made whole. And while it is true that such a claim is not one, which, under the statute, bears interest, nevertheless, if reparation for the injury is delayed for a long time by the wrong-doer, the injured party can not be made whole unless the damages awarded include compensation, in

the nature of interest, for withholding the reparation which ought to have been promptly made."

In *Clevenger v. Westfield Co. (1978), 60 Ohio App.2d 1, 14 O.O.3d 3, 395 N.E.2d 377,* paragraph two of the syllabus, the court said that "[t]he jury may assess prejudgment interest in favor of the insured under an automobile collision insurance policy where the insurer does not make a reasonable offer of settlement on or before the date the loss is due and payable." While, admittedly, that court was dealing with a predecessor version of R.C. 1343.03, it also discussed possible recovery of interest under common-law principles. The allowance of prejudgment interest by the *Hogg* and *Cobb* courts without a specific statutory provision and the discussion of the common-law right to interest by the *Clevenger* court confirm that prejudgment interest was known at common law.

Having established that prejudgment interest was known at common law in Ohio, we now move to correct our statement in *Bell v. Mt. Sinai Med. Ctr. (1993), 67 Ohio St.3d 60, 63, 616 N.E.2d 181, 183,* that "[a]ppellants correctly observe that an action for prejudgment interest pursuant to R.C. 1343.03(C) constitutes a special proceeding inasmuch as the right to obtain such relief is purely statutory in nature and was unavailable at common law." This statement was incorrect and the cases cited as authority for the proposition do not support it. Prejudgment interest was known at common law and, consequently, an action seeking prejudgment interest does not constitute a special proceeding. See *Polikoff v. Adam (1993), 67 Ohio St.3d 100, 616 N.E.2d 213,* syllabus, where

we said that "[o]rders that are entered in actions that were recognized at common law or in equity and were not specially created by statute are not orders entered in special proceedings pursuant to R.C. 2505.02." See, also, *Dayton Women's Health Ctr. v. Enix (1990), 52 Ohio St.3d 67, 74, 555 N.E.2d 956, 962* (Douglas, J., dissenting). Accordingly, we modify Bell to correct our previous error.

B. The Statute – R.C. 1343.03(C) – Purpose

In 1982, Representative (now Judge, Tenth District Court of Appeals) Dana Deshler, Jr., introduced and sponsored Am.Sub.H.B. No. 189, 139 Ohio Laws, Part I, 2034. Eventually passed by the General Assembly and signed into law by the Governor, the bill enacted R.C. 1343.03(C), which permits an injured party, in certain circumstances, to recover interest in a tort action from the date the cause of action accrues. Thus, Ohio has created a statutory right to prejudgment interest.

R.C. 1343.03(C) reads:

"Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case."

In *Peyko v. Frederick (1986), 25 Ohio St.3d 164, 167, 25 OBR 207, 209, 495 N.E.2d 918, 921,* we said that "[t]he purpose of R.C. 1343.03(C) is to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy." In *Kalain v. Smith (1986), 25 Ohio St.3d 157, 159, 25 OBR 201, 202, 495 N.E.2d 572, 574,* this court said that "[t]he statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting."

Thus, the purpose of the statute is clear. What are the components of the statute?

C. Components of the Statute

The statute sets forth certain requirements. First, a party seeking interest must petition the court. The decision is one for the court – not any longer a jury. The motion must be filed after judgment and in no event later than fourteen days after entry of judgment. *Cotterman v. Cleveland Elec. Illum. Co. (1987), 34 Ohio St.3d 48, 517 N.E.2d 536,* paragraph one of the syllabus. Second, the trial court must hold a hearing on the motion. Third, to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, fourth, the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. R.C. 1343.03(C).

The statute uses the word "shall." Therefore, if a party meets the four requirements of the statute, the decision to allow or not allow prejudgment interest is not discretionary. What is discretionary with the trial court is the determination of lack of good faith. Since the crux of the statute is "good faith effort" and the ultimate decision whether to award prejudgment interest is reposed in the trial judge and, further, since the standard of review on appeal is abuse of discretion, *Ziegler v. Wendel Poultry Serv., Inc. (1993), 67 Ohio St.3d 10, 20, 615 N.E.2d 1022, 1032,* the obvious question becomes what is a "good faith effort" or, conversely, when has a party "failed to make a good faith effort to settle"?

D. Good Faith Effort

R.C. 1343.03(C) clearly requires the development of a judicial standard of good faith. In this court's recent case on the question, *Kalain, supra, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572,* at the syllabus, we said that:

"A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

While the last sentence in this syllabus has caused some difficulty we, nevertheless, reaffirm our holding

with the caveat that the last sentence of the syllabus should be strictly construed so as to carry out the purposes of R.C. 1343.03(C).

The effect of *Kalain* is to place the burden of proof on a party seeking prejudgment interest. This is, to a degree, unfortunate since much of the information needed to make a case for prejudgment interest is in the possession of the party resisting an award. Accordingly, it is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors would include responses – or lack thereof – and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should also be considered by a trial court in making a prejudgment interest determination.

Even though the burden of a party seeking an award is heavy, the burden does not include the requirement that bad faith of the other party be shown. Lack of a good faith effort to settle should not be confused with bad faith. As we noted in *Kalain, supra, 25 Ohio St.3d at 159, 25 OBR at 202-203, 495 N.E.2d at 574*, a party may have failed to make a good faith effort to settle even though he or she did not act in bad faith. In this regard, we now move to correct a statement we made in *Villella, supra*. Therein, we stated that "a lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud." *Id., 45 Ohio St.3d at 42, 543 N.E.2d at 470*. We now

find that statement, as it relates to the lack of a good faith effort to settle, does not represent the state of the law as set forth in *Kalain*. Therefore, we now specifically modify the law stated in *Villella* by disapproving the above-quoted language. We hold that in prejudgment interest determinations pursuant to R.C. 1343.03(C), the phrase "failed to make a good faith effort to settle" does not mean the same as "bad faith."

In making this so-called good faith determination, a trial court is faced with a number of difficult issues. Two of those issues involve discovery and privilege. After a ruling on discovery has been made by the trial court, the question then arises as to the appealability of that determination.

E. Discovery – Privilege – Appealability

Our review of the extensive transcript of the prejudgment interest hearing conducted in this case sheds some light on the difficulties facing the bench and bar. Without question, one of the most difficult problems concerns the scope of discovery available in a proceeding for prejudgment interest.

In *Peyko, supra, 25 Ohio St.3d 164, 25 OBR 207, 495 N.E.2d 918*, paragraphs one and two of the syllabus, this court held that:

"1. When a plaintiff, having obtained a judgment against a defendant, files a motion for prejudgment interest on the amount of that judgment pursuant to R.C. 1343.03(C), the plaintiff, upon a showing of 'good cause' pursuant to Civ.R. 26(B)(3), may have access through

discovery to those portions of the defendant's insurer's 'claims file' that are not shown by the defense to be privileged attorney-client communications.

"2. If the defense asserts the attorney-client privilege with regard to the contents of the 'claims file,' the trial court shall determine by in camera inspection which portions of the file, if any, are so privileged. The plaintiff then shall be granted access to the non-privileged portions of the file."

Peyko establishes that any determination regarding a party's good faith effort to settle requires a review of the settlement efforts made by a party's insurance carrier(s). *Id. at 166-167, 25 OBR at 209, 495 N.E.2d at 921.* Most of the information regarding the insurer's efforts will be contained in the claims file. In this regard, *Peyko* clearly recognizes that a post-trial proceeding for prejudgment interest is amenable to the general discovery process established by the Civil Rules. Indeed, in *Cotterman, supra, 34 Ohio St.3d 48, 517 N.E.2d 536,* paragraphs two and three of the syllabus, this court held that:

"2. The R.C. 1343.03(C) proceeding is amenable to the discovery process. The trial court should exercise such governance so as to speedily resolve the post-trial discovery.

"3. The Rules of Civil Procedure, as utilized in the general discovery process, are applicable to R.C. 1343.03(C) proceedings."

However, *Peyko* provides little guidance on the ultimate question: What is a privileged communication between an attorney and a client? We must look to the

purposes of R.C. 1343.03(C), 2317.02 and Civ.R. 26 to provide the answer.

The attorney-client privilege has ancient roots. The history of the privilege can be traced back at least as far as the reign of Elizabeth I, where the privilege was already well established. See 8 Wigmore, Evidence (McNaughton Rev.1961), Section 2290. See, also, *Spitzer v. Stillings (1924), 109 Ohio St. 297, 142 N.E. 365.* In the modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential. Only in this manner can there be freedom from apprehension in the client's consultation with his or her legal advisor. Wigmore, *supra,* at Section 2291. However, the privilege is not absolute. That is to say, the mere relation of attorney and client does not raise a presumption of confidentiality of all communications made between them. *Id.* at Section 2311. Moreover, it is beyond contradiction that the privilege does not attach in a situation where the advice sought by the client and conveyed by the attorney relates to some future unlawful or fraudulent transaction. Advice sought and rendered in this regard is not worthy of protection, and the principles upon which the attorney-client privilege is founded do not dictate otherwise. See Wigmore, *supra,* at Section 2298. See, also, *Lemley v. Kaiser (1983), 6 Ohio St.3d 258, 6 OBR 324, 452 N.E.2d 1304,* wherein Judge (now Justice) Alice Robie Resnick, writing for this court, found that the attorney-client privilege exists to aid in the administration of justice and must yield in circumstances where justice so requires.

With these principles in mind, it is clear that statements, memoranda, documents, etc. generated in an

attorney-client relationship tending to establish the failure of a party or an insurer to make a good faith effort to settle a case contrary to the purposes of R.C. 1343.03(C) are not protected from discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. Stated otherwise, if, through the lack of a good faith effort to settle, the purposes of R.C. 1343.03(C) have been thwarted by a party and/or the attorneys involved in the case, a search for the truth of that fact cannot be hindered by claims of attorney-client privilege. Documents and other things showing the lack of a good faith effort to settle by a party or the attorneys acting on his or her behalf are wholly unworthy of the protections afforded by any claimed privilege.

As we have stated, the purpose of R.C. 1343.03(C) is to encourage good faith efforts to settle a case outside the trial setting. The focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the *pretrial* settlement efforts made between the plaintiffs and defendants and/or their insurers. Often, the only way for a party to prove another party's failure to make a good faith effort to settle is by obtaining the claims file of an insurer. However, the attempt to do so is often met by defense objections to the discoverability of matters contained within the file on the basis of work product or attorney-client privilege. If access to the file or matters contained therein is denied on the basis of privilege, the hearing required under R.C. 1343.03(C) may amount to nothing less than a retrial of the entire case. The case at bar is an example of this recurrent phenomenon, although the insurer's claims file in this case was not

necessary to show that Figgie and/or those acting on his behalf failed to make a good faith effort to settle the case.

The purpose of Civ.R. 26 is to provide a party with the right to discover all relevant matters, not privileged, that are pertinent to the subject of the pending proceeding. Civ.R. 26(B)(1). As indicated, in some cases, nothing is more relevant in an R.C. 1343.03(C) proceeding than the claims file of an insurer. The file may contain memoranda or other relevant matters which establish the lack of a good faith effort to settle. At the same time, the matters contained within the file may be privileged work product or attorney-client communications, beyond the scope of discovery.

The time has come for this court to define what is and is not a privileged communication[8] in an insurer's

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[8] R.C. 2317.02(A) sets forth a testimonial privilege respecting communications made between an attorney and a client. R.C. 2317.02 provides, in pertinent part:

"The following persons shall not testify in certain respects:

"(A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client * * *.

"(B)(1) A physician or a dentist, concerning a communication made to him by his patient in that relation or his advice to his patient * * *."

Although R.C. 2317.02 grants a privilege respecting attorney-client communications, the statute does not define what is meant by the term "communication" in that context. R.C. 2317.02(B)(3) does define "communication" in the context of the physician/dentist and patient relationship to mean "acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient." (Emphasis added.) Thus, R.C. 2317.02 provides only minimal guidance on the question concerning privileged

claims file for purposes of discovery in an R.C. 1343.03(C) proceeding for prejudgment interest. In our judgment, only those attorney-client communications contained in an insurer's claims file that go directly to the theory of defense are to be excluded from discovery. To hold otherwise would be to undermine the entire purpose of a hearing on the issue of prejudgment interest, i.e., to ascertain the truth regarding good faith efforts to settle. Civ.R. 26(B)(3) provides, in part, that "a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor." In a prejudgment interest proceeding, the good-cause requirement of Civ.R. 26(B)(3) is that which is appropriate to effectuate the General Assembly's purposes of enacting R.C. 1343.03(C) – to encourage and bring about settlements.

In our continuing efforts to provide guidance to the bench and bar on difficult and pressing issues, we hold that in an R.C. 1343.03(C) proceeding for prejudgment interest, neither the attorney-client privilege nor the so-called work product exception precludes discovery of an

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attorney-client communications that may be contained in an insurer's claims file. However, given the definition of "communication" in R.C. 2317.02(B)(3) concerning a physician or dentist, it could be argued that, by analogy, a "privileged communication" between an attorney and a client found in an insurer's claims file should be limited to those matters going directly to the theory of defense of the underlying lawsuit.

insurer's claims file. The only privileged matters contained in the file are those that go directly to the theory of defense of the underlying case in which the decision or verdict has been rendered. Additionally, on occasion, this rule might also apply to the file of a party's attorney.

Having identified the character of discoverable items in an R.C. 1343.03(C) proceeding for prejudgment interest, we reiterate our holding in *Peyko, supra, 25 Ohio St.3d 164, 25 OBR 207, 495 N.E.2d 918,* paragraph two of the syllabus, that where the defense asserts a claim of privilege with regard to items contained in an insurer's claims file, the trial court shall conduct an in camera inspection to determine which items are privileged. Having so stated, we now move to the question of the appealability of a trial court's order compelling or denying discovery in an R.C. 1343.03(C) proceeding.

Following the ruling in *Peyko, supra,* this court then decided *Bell, supra, 67 Ohio St.3d 60, 616 N.E.2d 181.* In *Bell,* we held that the order of a trial court directing a witness opposing a request for discovery in an R.C. 1343.03(C) prejudgment interest hearing to submit materials to an in camera inspection is not a final appealable order. This court in *Bell* also, however, indicated that an order in an R.C. 1343.03(C) proceeding permitting discovery after submission of alleged privileged materials for an in camera inspection is an order affecting a substantial right made in a special proceeding. *Id. at 64, 616 N.E.2d at 184-185.* Thus, according to *Bell,* such an order is a final

order subject to immediate appeal.[9] We now find this statement in *Bell* to be incorrect. The statement was based upon the assumption that prejudgment interest was not known at common law and thus a prejudgment interest proceeding was a special proceeding. As pointed out above, prejudgment interest was known at common law and, thus, any order made in a prejudgment interest proceeding is not one made in a special proceeding.

Accordingly, we further modify *Bell* to correct our error. In doing so, we hold that an order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of "final order" set forth in R.C. 2505.02. Such an order does not determine the action or prevent a judgment, nor is it rendered in a special proceeding. Thus, an appeal from such an order must await final judgment in the prejudgment interest proceeding.

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[9] R.C. 2505.02 reads:

"An order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial.

"When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside."

F. R.C. 1343.03(C) Applied to this Case

The court of appeals' majority, citing *Kalain, supra, 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572,* affirmed the judgment of the trial court denying appellant's motion for prejudgment interest. Specifically, the court of appeals' majority found that Figgie was not obligated to make a monetary settlement offer because Figgie possessed a good faith, objectively reasonable belief that he was not liable to appellant. We find that determination to be untenable on the facts of this case.

Figgie never made any offer to settle. If Figgie ever had a good faith, objectively reasonable belief that he had no liability, the fact that the "arbitration" panel unanimously found against Figgie should have apprised him that a finding of liability at trial was possible, if not probable. Given the substantial amount of conflicting evidence in this case, the fact that medical records disappeared and were altered and the unanimous determination of the panel of "arbitrators," the inescapable conclusion is that Figgie failed to rationally evaluate his potential liability. Appellant made monetary settlement offers within the limits of Figgie's malpractice insurance coverage. One such offer was for approximately $4.3 million – the value placed upon this case by the "arbitration" panel, which did not consider the issue of punitive damages. Figgie refused to engage in any settlement negotiations.

We find that, as a matter of law, prejudgment interest should have been awarded on the facts of this case. The trial court's failure to award prejudgment interest was an

abuse of discretion.[10] We further find that the accrual date of Moskovitz's survival cause of action was January 1, 1988,[11] and prejudgment interest at the statutory rate is to be computed from and including that date up to and including the date the judgment is paid. As to the wrongful death portion of the judgment, interest is to be calculated from and including the date of death, December 5, 1988, up to and including the date the judgment is paid. The amount of interest is to be computed by the trial court upon remand.

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[10] The prejudgment interest proceeding concluded after a hearing over two days and produced a transcript of three hundred thirty-eight pages. The trial court, without explanation, denied prejudgment interest.

[11] For purposes of determining the accrual date of the survival action, several events that occurred between November 1987 and the end of January 1988 are significant. These events include the removal of the tumor and the diagnosis of malignancy on November 10, 1987, the identification of the type of tumor on November 13, 1987, Moskovitz's apparent knowledge on November 11, 1987 that the tumor was malignant, and Figgie's receipt of the medical records in December 1987 and the disappearance of those records possibly in January 1988 (see Frysinger v. Leech [1987], 32 Ohio St.3d 38, 512 N.E.2d 337, paragraph one of the syllabus). Although it is difficult to determine the precise accrual date of the survival cause of action given the state of the record before us, we find that January 1, 1988 is the appropriate date of accrual to be used in the calculation of prejudgment interest.

IV

Sanctions

The final issue presented for our consideration is whether it was proper for the trial court to have sanctioned appellant's attorney, Charles Kampinski, under Civ.R. 11. Sanctions were awarded in favor of Dr. Makley in the amount of $4,000. This award was based upon the fact that Kampinski did not present expert testimony against Makley at trial to establish that Makley's treatment of Moskovitz deviated from accepted standards of care. The trial court concluded that Kampinski did not have good and reasonable grounds to pursue the action against Makley, particularly after the "arbitration" panel found in favor of Makley on the issue of liability. The trial judge who decided this issue was not the same judge who had presided over the case at trial.

As a preliminary matter, we note that Kampinski, in his individual capacity, did not file a notice of appeal from the judgment of the court of appeals affirming the $4,000 award in favor of Makley. That is, Kampinski currently represents the appellant in this case, and he properly filed a notice of appeal *for appellant*, without indicating that he himself was appealing from the sanctions imposed upon him personally. To complicate matters, the attorneys who represented both Makley and Figgie do not claim to represent Makley before this court. However, as attorneys for *Dr. Figgie*, they have briefed the issue of sanctions and seek to uphold the award that was granted in *Makley's favor*. The conclusion we draw is that the issue of sanctions, which affects Kampinski individually, has become an integral part of all other matters

at issue in this case. We find that the notice of appeal filed by Kampinski on behalf of his client was sufficient to encompass the issue of sanctions and that Kampinski may properly be considered an appellant in his individual capacity.

Turning our attention to the merits of the issue, we believe that Kampinski should not have been sanctioned for pursuing the action against Dr. Makley for medical malpractice. The thrust of the allegations against Makley in the final amended complaint was that he unnecessarily amputated Moskovitz's leg and informed her that the amputation was to cure the cancer, rather than to ease her pain. However, in the absence of competent expert medical testimony against Dr. Makley, a prima facie case of medical malpractice could not be maintained.

In his deposition, Dr. Engleberg, plaintiff's medical expert, testified as follows:

"Q Are you going to state at the trial of this matter [that] * * * Dr. Makley in his care and treatment of Mrs. Moskovitz deviated from the accepted standards of medical care?

"A I will state that if, in fact, the patient was told that the procedure [amputation] was done in order to cure her or if, in fact, the patient was not shown to have had a lot of suffering and pain in that leg, then I would say Dr. Makley deviated from the standard of care.

"Q Okay. I want to be very clear that if she – are you talking about informed consent * * * [?]

"A No, no. Not necessarily written informed consent. If the patient understood that there was no chance of cure by having her leg amputated and wanted it done anyway because she had severe intractable pain and that can be demonstrated, then I would not say his care deviated from the standard of care.

"If, on the other hand, it cannot be demonstrated that she was having severe and intractable pain in that leg and the patient did not fully understand that the procedure was not of a curative intent, then I will say he deviated from the standard of care.

"I think the jury should be able to determine which of those sets of facts, which of those scenarios would most closely reflect reality."

Engleberg further testified in his deposition that he had found no evidence of informed consent or of intractable pain.

Engleberg's deposition testimony established a reasonable basis for Kampinski to fashion a complaint against Makley for medical malpractice. The deposition testimony of Aaron Moskovitz indicated that Mrs. Moskovitz was told that the amputation was for curative rather than palliative purposes. Thus, the factual predicate for the expert medical testimony that Makley had deviated from accepted standards of care was established by Kampinski prior to trial. In addition, even though the "arbitration" panel found in favor of Makley on the issue of liability, the panel noted that there was some question as to whether Moskovitz had been properly informed of the purpose of the amputation. Moreover, given the convoluted machinations of this case, where records were

altered, lost and/or not appropriately maintained and where relevant portions of Makley's teaching file had come up missing, it might very well have been legal malpractice for Kampinski not to have Makley available as a defendant at trial.

Kampinski chose not to present the evidence against Makley at trial. Why that is, we will never know. However, the purpose of Civ.R. 11 is to prohibit the filing of groundless complaints and the evidence establishes that the allegations asserted against Makley were asserted in good faith. Accordingly, we reverse the judgment of the court of appeals on this issue and vacate the $4,000 award in favor of Makley.

V

Conclusion

For the foregoing reasons, the judgment of the court of appeals is reversed and the award of compensatory damages is reinstated. Appellant is entitled to prejudgment interest and we remand this cause to the trial court to calculate the amount of prejudgment interest due and to enter judgment accordingly. The award of punitive damages is reinstated, but we order a remittitur of $2 million on the punitive damage award. On remand, appellant may accept the remittitur and a judgment of $1 million in punitive damages, or appellant may refuse the remittitur, in which case a new trial should be conducted only on the issue of punitive damages. The award of sanctions is vacated.

Judgment reversed and cause remanded.

RESNICK, FRANCIS E. SWEENEY, Sr. and PFEIFER, JJ., concur.

MOYER, C.J., and A. WILLIAM SWEENEY and WRIGHT, JJ., dissent.

WRIGHT, Justice, dissenting.

I must respectfully dissent, as I would affirm in large measure the decision of the court of appeals.

I

In Part I of the majority's opinion there is found a scholarly discussion of the criteria for punitive damages and an excellent discourse on the concept underlying the tort of spoliation of evidence. I agree that any professional, whether doctor, lawyer, or accountant, found to have committed spoliation with the intent to defraud or otherwise injure a patient or client may be subject to a claim for compensatory or nominal damages coupled with a claim for punitive damages. Further, I see no problem combining a traditional malpractice suit with a cause of action alleging spoliation of evidence. However, I do not agree with the majority's decision to permit punitive damages in a *negligence* action, because the subsequent spoliation of records does not make the original act of negligence malicious.

My major concern with the majority's opinion is its treatment of the facts surrounding the *alleged* spoliation. I agree with the suggestion in the majority's opinion that if "records were altered, destroyed or concealed by Dr. Figgie in an effort to conceal his medical negligence," an award of punitive damages may be justified in a separate

cause of action. However, the question whether Dr. Figgie "altered certain records to conceal the fact that malpractice occurred" was a hotly disputed issue at trial, an issue vigorously rebutted with lengthy testimony by Dr. Figgie and his nurse. As is true with the determination of any significant fact, it was the province of the jury to make a finding and return a verdict on the issue of the alleged spoliation of evidence. Such a determination is *not* our task. What the majority overlooked, presumably, is that the trial judge did not include in his charge to the jury one single word concerning this hotly disputed issue of spoliation. Indeed, the entire jury charge dealt strictly with medical malpractice. The plaintiff neither pleaded a cause of action for spoliation nor asked for instructions on spoliation.

I also do not agree with the majority that "[i]f appellant were constrained to bring a separate cause of action for spoliation of evidence, that claim would inevitably fail since there is no damage flowing directly from the alteration of records." Some measure of damages will flow inevitably from the alteration of records when the alteration is done to avoid liability for the physician's medical negligence. At the very least, the plaintiff may have to expend additional time and effort to reconstruct the original records. Since the purpose of the spoliation is to avoid liability, the plaintiff's ability to succeed in the negligence action may be made more difficult because of the spoliated records. This harm can be seen in the present case. Dr. Figgie relied on his version of the records to claim that he was not negligent because he had advised appellant to have a biopsy but she refused his advice. The inclusion of this statement in his records may have made

appellant's claim more difficult to prove. When a physician commits spoliation of evidence to avoid liability for his or her medical negligence, the patient is automatically entitled to at least nominal damages. In some cases, for example where the spoliation impairs the future course of treatment of the patient, more than nominal damages may also result.[12]

Therefore, I would hold that a party must plead a separate cause of action for the tort of spoliation of evidence. The jury should be instructed that if it finds the defendant altered or destroyed records with the purpose of avoiding liability for his or her negligence, the jury must award at least nominal damages. The jury may then proceed to the question of punitive damages. In such a situation, the test of *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, can be met as the jury can properly find that actual malice occurred due to the defendant's "conscious disregard for the rights and safety of other

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[12] To presume damages arise from the intentional tort of spoliation of evidence is consistent with the long-standing presumption for other intentional torts such as assault, battery and defamation. "[E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury." *Ashby v. White* (King's Bench 1703), 2 Ld.Raym. 938, 955 (Holt, C.J., dissenting). Holt's position prevailed, as the majority was reversed by the House of Lords (1703), *id.* at 958.

persons that has a great probability of causing substantial harm." The great probability of substantial harm to the plaintiff is that an otherwise meritorious action for negligence will be defeated due to the tortious conduct of the defendant.

Suffice it to say, contrary to the conclusion reached by the majority following its review of the record, the jury *did not* make a finding that Dr. Figgie was involved in spoliation.[13] Without such a finding and verdict, which would be tantamount to a finding of malicious intent or reckless disregard, there exists no basis for punitive damages. Thus, the court of appeals correctly found that punitive damages were inappropriate in this case, as this was a cause premised on negligence.

In addition to the foregoing, I note that the trial judge was well aware that the jury's total award of $3 million in punitive damages at best equalled and probably far exceeded Dr. Figgie's net worth. I believe the punitive damage award in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366; *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1; *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* (1989), 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219.

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[13] In its first paragraph, the majority asserts that Dr. Figgie "altered certain records to conceal the fact that malpractice had occurred," as if the jury made a specific finding on this issue.

II

The jury award of punitive damages having been determined to be without basis, it is perfectly clear that, as stated by the court of appeals, the compensatory damage award was excessive and the product of passion and prejudice. I am convinced that, as the court of appeals pointed out, "the jury's survivorship award [of $2 million] was impermissibly influenced by the jury's erroneous consideration of punitive damages." I also agree fully with the court of appeals that the jury's wrongful death award of $1.25 million was "manifestly excessive."

This court consistently has ruled that where an excessive verdict is the product of passion and prejudice, a new trial must be granted. *Larrissey v. Norwalk Truck Lines* (1951), 155 Ohio St. 207, 44 O.O. 238, 98 N.E.2d 419, paragraph four of the syllabus. We have emphasized, for example, that "[i]n a trial of a negligence action * * * deliberate and persistent appeals to the sympathy of the jury, either directly or indirectly, are improper, as tending to induce either excessive or inadequate verdicts as a result of such appeal to the passion or prejudice of the jury." *Book v. Erskine & Sons, Inc.* (1951), 154 Ohio St. 391, 43 O.O. 334, 96 N.E.2d 289, paragraph one of the syllabus. Thus, "where the damages awarded are excessive and appear to have been given under the influence of passion or prejudice, *the resulting prejudice cannot be corrected by remittitur*; the only recourse is the granting of a new trial." (Emphasis added.) *Id.* at paragraph two of the syllabus. See, also, *Guccione v. Hustler Magazine, Inc.* (Oct. 8, 1981), Franklin App. No. 80AP-375, unreported, at 33, 1981 WL 3516.

Even a cursory review of the record reveals that counsel for Moskovitz leveled "deliberate and persistent appeals to the sympathy of the jury," referring repeatedly, for instance, to Mrs. Moskovitz's confinement in a Nazi concentration camp during the Second World War. The record also indicates that plaintiff's counsel made the spoliation claim, not the malpractice claim, the primary focus of the trial. Moskovitz's counsel devoted most of his cross-examination of Dr. Figgie, ninety pages of testimony, to the alteration of Moskovitz's medical records. In opening statements and again in closing arguments, counsel for Moskovitz emphasized and reemphasized the issue of spoliation, alluding many times to Dr. Figgie's cover-up and the "smoking gun." Throughout the trial, counsel for Moskovitz repeatedly attempted to direct the jury's attention to the allegation that Dr. Figgie had tried to conceal his negligent treatment of Moskovitz by subsequently altering the medical records. But despite this pattern of conduct, as previously stated, the trial court never instructed the jury on the matter of spoliation or gave a limiting instruction thereon. Not even a suggestion of the spoliation issue exists in the trial court's charge to the jury.

In light of the foregoing, I believe the court of appeals correctly found that the jury was wrongfully influenced and that both the compensatory damage award and the award of punitive damages were excessive and the result of passion and prejudice. Therefore, I feel the court of appeals properly remanded the case to the trial court for a new trial on the issue of compensatory damages.

III

I must also address the majority's position on prejudgment interest and the majority's treatment of *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 616 N.E.2d 181.

The majority begins its discussion of this issue by declaring that a common-law right to prejudgment interest existed in Ohio and, therefore, contrary to a recent decision of this court, a prejudgment interest proceeding is not considered a "special proceeding" for purposes of R.C. 2505.02. Thus the majority concludes, in paragraph four of the syllabus, that "[a]n order compelling or denying discovery in an R.C. 1343.03(C) proceeding for prejudgment interest does not meet the definition of 'final order' set forth in R.C. 2505.02."

This statement by the majority attempts to modify a decision issued by this court just last term. In *Bell* we were faced squarely with the question of whether an order for discovery in a prejudgment interest hearing was a final appealable order.

The issue we addressed in *Bell*, however, is *not* an issue before this court today. Rather, the question we must answer today is whether the award of prejudgment interest was appropriate in this case. We have not been asked to consider the appealability of an order issued during a prejudgment interest hearing. Hence, the lengthy discussion engaged in by this court concerning the appealability of an order issued during a prejudgment interest hearing is nothing more than dicta. Given the recent issuance of the *Bell* decision, the present case is not the proper forum for such a discussion. Members of

this court had ample opportunity to express any reservations concerning that issue during our consideration of *Bell*, which was decided by six members of this court with the seventh member concurring in judgment only. At a minimum, because it does not address an issue before this court, the dicta should be removed from the syllabus.

I also take issue with the majority's decision of the *relevant* prejudgment interest question.

It is well-settled law that the decision to award prejudgment interest lies within the sound discretion of the trial court. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 19 OBR 123, 482 N.E.2d 1248. That decision will not be reversed by a court of appeals unless the record reflects an abuse of discretion by the trial court. *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 25 OBR 201, 495 N.E.2d 572. The phrase "abuse of discretion" is a term of art defined long ago to mean "more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Steiner v. Custer* (1940), 137 Ohio St. 448, 19 O.O. 148, 31 N.E.2d 855, paragraph two of the syllabus. Clearly then, the decision of the trial court in this case should remain undisturbed unless that decision was tainted by an unreasonable, arbitrary, or unconscionable attitude.

In my judgment there is no evidence of any abuse of discretion here. The trial court denied Moskovitz's motion for prejudgment interest only after conducting a lengthy hearing on the matter. During the hearing both sides had adequate opportunity to present their evidence and arguments. Considering the strong disagreement

between the parties with respect to several significant facts as well as the lengthy testimony and evidence presented by Dr. Figgie in rebuttal to Moskovitz's charges, plainly the trial court did not abuse its discretion in concluding that Dr. Figgie had a good faith, objectively reasonable belief that he was not liable. Based on this conclusion I believe the trial court properly held that Dr. Figgie was not obligated, pursuant to *Kalain*, to offer Moskovitz a monetary settlement offer, and that the failure to do so did not reflect a failure of good faith and, of course, did not warrant an award of prejudgment interest.

IV

I strongly believe that the court of appeals correctly reversed and vacated the punitive damage award, reversed the compensatory damage award and remanded the compensatory damage issue for a new trial, and affirmed the denial of the motion for prejudgment interest. Thus, for the foregoing reasons I would affirm the judgment of the court of appeals in part but remand for a new trial on the issue of compensatory damages and the issue of spoliation.

MOYER, C.J., and A. WILLIAM SWEENEY, J., concur in the foregoing dissenting opinion.